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In The

Supreme Court of the United States

October Term, 1983

EUGENE KISIELOWSKI and UNITED TEREX, INC.,

Petitioners,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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QUESTIONS PRESENTED

Does a United States District Court have jurisdiction over the United States under the Federal Tort Claims Act, 28 U.S.C. §2674 *et seq.*, for the tortious conduct of its agents where its agents, while administering a supply contract, intentionally:

A. created false records in an attempt to justify the blacklisting and impugning of petitioners' integrity;

B. used threats of economic reprisal and summary punishment to gain access to confidential trade secrets and to silence petitioner's criticism of government testing procedures; and

C. denied petitioners their constitutionally-mandated right to respond to lack of integrity charges before blacklisting petitioners and rejecting their bid for lack of integrity?

PARTIES TO THE PROCEEDING

William Hunt and George Mergel were parties to the action in the District Court in addition to the petitioners and the United States. The actions against William Hunt and George Mergel were dismissed without prejudice by the District Court for lack of service. The Court of Appeals for the Third Circuit affirmed this dismissal without prejudice.

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No.

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EUGENE KISIELOWSKI and UNITED TEREX, INC.,

Petitioners,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

OPINIONS BELOW

The opinion of the Court of Appeals for the Third Circuit is a "Not for Publication" opinion and is therefore not reported; however, it appears in the Appendix hereto along with the memorandum of decision of the District Court for the Eastern District of Pennsylvania.

JURISDICTION

The judgment of the Court of Appeals for the Third Circuit was entered on March 6, 1984. This petition for certiorari was filed within ninety (90) days of that date. This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

The jurisdiction of the federal District Court was invoked under 28 U.S.C. §1331, 28 U.S.C. §2671, *et seq.* and the First, Fourth and Fifth Amendments of the United States Constitution.

STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED

28 U.S.C. §1331. Federal question

> The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States.

28 U.S.C. §1346. United States as defendant

> (a) The district courts shall have original jurisdiction, concurrent with the United States Claims Court, of: . . .
>
> (2) Any other civil action or claim against the United States, not exceeding $10,000 in amount, founded either upon the Constitution, or any Act of Congress, or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort, except that the district courts shall not have jurisdiction of any civil action or claim against the

United States founded upon any express or implied contract with the United States or for liquidated or unliquidated damages in cases not sounding in tort which are subject to sections 8(g)(1) and 10(a)(1) of the Contract Disputes Act of 1978. For the purpose of this paragraph, an express or implied contract with the Army and Air Force Exchange Services, Navy Exchanges, Marine Corps Exchanges, Coast Guard Exchanges, or Exchange Councils of the National Aeronautics and Space Administration shall be considered an express or limited contract with the United States.

(b) Subject to the provisions of chapter 171 of this title, the district courts, together with the United States District Court for the District of the Canal Zone and the District Court of the Virgin Islands, shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, accruing on and after January 1, 1945, for injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred. . . .

28 U.S.C. §2674. Liability of United States

The United States shall be liable, respecting the provisions of this title relating to tort claims, in the same manner and to the same extent as a private individual under like circumstances, but

shall not be liable for interest prior to judgment or for punitive damages . . .

28 U.S.C. §2675. Disposition by federal agency as prerequisite; evidence

(a) An action shall not be instituted upon a claim against the United States for money damages for injury or loss of property or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, unless the claimant shall have first presented the claim to the appropriate Federal agency and his claim shall have been finally denied by the agency in writing and sent by certified or registered mail. The failure of an agency to make final disposition of the claim within six months after it is filed shall, at the option of the claimant any time thereafter, be deemed a final denial of the claim for purposes of this section. The provisions of this subsection shall not apply to such claims as may be asserted under the Federal Rules of Civil Procedure by third party complaint, cross-claim, or counterclaim. . . .

28 U.S.C. §2580. Exceptions

The provisions of this chapter and section 1346(b) of this title shall not apply to —

(a) Any claim based upon an act or omission of an employee of the Government, exercising due care, in the execution of a statute or regulation, whether or not such statute or regulation be valid or based upon the exercise or performance or the

failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused. . . .

(h) Any claim arising out of assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights: *Provided,* That, with regard to acts or omissions of investigation or law enforcement officers of the United States Government, the provisions of this chapter and section 1346(b) of this title shall apply to any claim arising, on or after the date of the enactment of this proviso, out of assault, battery, false imprisonment, false arrest, abuse of process, or malicious prosecution. For the purpose of this subsection, "investigative or law enforcement officer" means any officer of the United States who is empowered by law to execute searches, to seize evidence, or to make arrests for violations of Federal law. . . .

First Amendment, United States Constitution:

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Fourth Amendment, United States Constitution:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Fifth Amendment, United States Constitution:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; not shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken by public use, without just compensation.

STATEMENT OF THE CASE

Petitioner United Terex, Inc. ("UTI") is a government contractor (6a)[1]; petitioner Eugene Kisielowski is UTI's Chief Executive and Operating Officer.

Although the setting of this action was created by a contract between UTI and the United States, petitioners in the court below complained of the breach of *no* contractually-assumed duty.[2] The duties which respondents owed the petitioner and which petitioners alleged were breached are tort duties traceable to common law as well as the Fifth, Fourth and First Amendments.

In 1979, UTI as low bidder, was awarded a contract to manufacture aerial slings designed to hold cargo for pick-up and transport by helicopter (62a). The contract, as most government contracts, contained a standard Changes clause, which permits the respondent to change the specifications without contractor approval. When the government does change a contract in this fashion, the government is obligated to equitably adjust or pay for those changes (62a).

For whatever reason, the respondents who administered the contract for the government treated the petitioners differently from other contractors (74a, 83a-85a).

When petitioners were excusably delayed because of a nationwide British steel strike which was publicized throughout the world, the respondents threatened to terminate (a forfeiture)

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1. References designated "____a" refer to pages of the Appendix hereto.

2. The breach of the United States' contractually-assumed duties is the subject of a separate and distinct suit before the United States Claims Court [*United Terex, Inc. v. United States,* Cl. Ct. No. 353-81C, (61a-69a)].

Petitioners discovered that a government test was not technically feasible and did not accomplish the purpose for which it was intended. This was brought to the respondents' attention (62a-64a). The respondents revised the test but tried to get petitioner to agree to the revised test procedure and waive any rights under the changes article (80a-81a, 123a, 124a). Petitioner after analysis of the revised test procedure concluded that the revised test procedure was meaningless and still not feasible. Petitioner nevertheless agreed to perform the test if the respondent would direct it to do so through a unilateral change order (80a-81a). The respondents never did issue the order (63a-64a), but instead wrongfully terminated the petitioners' contract in part for not performing that test on the first article (130a-134a). This was done despite the fact that the test was not feasible,* that the revised test was never made part of the contract, and that the date for the submission of the first article test had actually been waived! (66a-67a, 76a-81a).

When petitioner requested and received a progress payment based on its obligation to a supplier (139a-143a), the respondents purposely misrepresented petitioners' relationship with its supplier (*compare* 139a-143a, 145a-148a *with* 149a-150a). To create the false picture of criminality (81a, 83a), the respondents falsely created documents which stated that petitioner had not paid its supplier anything and indeed had not even placed an order (149a-150a, 157a-158a). Respondents without even giving petitioner the opportunity to cure the alleged albeit untrue defect, terminated petitioners' contract in part on this basis. (Under normal government contract procedure petitioners would have been issued a ten day letter giving them an opportunity to cure the defect. If petitioners then failed to cure, the contract could be terminated). In petitioners' case, the respondents terminated without giving petitioner an opportunity to cure any defect. As a matter of fact, petitioners

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* A F.O.I.A. request has produced a memorandum from a Ronuald Buescher, Chief Logistics Engineering Division dated November 9, 1983 referring to the test as a defect in the specification.

in a good faith attempt to obviate any problem, offered to repay the progress payments (para. 76, 82a).

Thus, in summary, tortious conduct complained of consists of conspiring and doing the following:

a. The rejection (blacklisting) of petitioners' bid for lack of integrity *before* giving petitioner its constitutionally-mandated[3] opportunity to respond (*cf.*, 46a, 47a, 50a, 149a-150a, 155a-156a, 157a-158a *with* 81a-82a, 83a, 139a-143a, 145a-147a).

b. The creation of false records to make it appear as though petitioner had accepted government progress payments,[4] but "didn't formally order anything" and that the supplier "had received no money from respondent (149a-150a); along with falsely stating that the supplier had been contacted and "he advised that the purpose of the invoice was to set terms for any future sales, that nothing had been ordered, and no money changed hands" (*compare* 149a-150a and 157a-159a with signed Order 139a-144a and Affidavit of Supplier 145a-147a).

c. Threatening economic reprisals and the use of economic reprisal as a form of summary punishment in an attempt (1) to

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3. If a contracting officer proposes to reject a bid for lack of integrity, he must first give the bidder a chance to respond. This right is firmly bottomed in the United States Constitution. *Related Industries, Inc. v. United States,* 1 F.P.D. Section 134 (1983) at pages 14, 15 and 20 of Judge Miller's opinion; *Old Dominion Dairy Products, Inc. v. Secretary of Defense,* 631 F. 2d 953, 968, 969 (C.A.D.C. 1980).

4. Government contracts such as petitioners' provide for progress payments. Money is released to a contractor even in advance of deliveries so that the contractor may pay his suppliers. If a contractor were to request progress payments based on a non-existent supplier's commitment, it would be criminal, *e.g.,* 18 U.S.C. §1001.

keep petitioner from pursuing its contract remedies (para. 52, Petitioner's Affidavit, 79a); (2) to gain access to certain trade secrets which enabled petitioner to underbid a contractor favored by the respondents (75a, 83a-84a); and (3) to silence petitioners' whistle-blowing concerning respondents' defective testing procedures (76a-80a, 107a-114a, 116a, 117a-120a, 123a-124a).

d. Causing false records to be created after termination to support the economic reprisal taken (*e.g.*, para. 63, Petitioner's Affidavit, 80a; para. 82, Petitioner's Affidavit 83a-84a, 153a-154a).

Based on the foregoing, petitioners, acting through their attorneys and after exhausting their administrative remedies instituted suit against the United States under the Federal Tort Claims Act and against the individual respondents under the principles set forth in the *Bivens* cases, 400 U.S. 388 and 456 F. 2d 1339 (C.A. 2, 1972) and *Bethea v. Reid,* 445 F. 2d 1163 (C.A. 3, 1971).

The jurisdiction of the federal District Court was invoked under 28 U.S.C. §1331; 28 U.S.C. §2671 *et seq.* and the First, Fourth and Fifth Amendments of the United States Constitution.

Because the blacklisting without prior opportunity to respond was so explicitly outlawed by the Constitution, so nefarious and of such far-reaching effect, the petitioners charged all respondents with intentional infliction of mental distress (Count V of Complaint, 32a).

All respondents were also charged with conspiracy to subvert due process through infliction of economic reprisal and summary punishment (Count I of Complaint, 28a-30a); subverting due process through the foregoing (Counts II and IV of Complaint, 30a, 31a); and interference with prospective advantage (Count III of Complaint, 30a-31a).

Because the Federal Tort Claims Act has not conferred jurisdiction for injurious falsehood, only the individual respondents, based on their creation of false records and dissemination of them, were charged with injurious falsehood (Count VI of Complaint, 32a).

On motions to dismiss and for summary judgment, the District Court dismissed with prejudice all Counts (I through V) against the United States. Counts I, II and IV were dismissed as to the United States because they "are contract claims" over which only the Claims Court has jurisdiction for amounts exceeding $10,000 (21a). Count III, interference with economic advantage, was dismissed as against the United States as barred by the doctrine of sovereign immunity for "interference with contract rights" (15a-17a). As an alternate ground for dismissal of Count III as to the United States, the District Court reasoned that since the initial claims to the Secretary of Army did not specifically include a claim for interference with prospective business advantage, there was no exhaustion of administrative remedies (17a-18a). As to Count V, the District Court dismissed as to the United States by finding the respondent's conduct was not sufficiently "outrageous" to qualify for the intentional infliction of mental distress (18a-21a).

As to the individual respondents, the District Court dismissed without prejudice (25a), all of the Counts (I-VI) for failure to make proper service and even assuming proper service, for lack of personal jurisdiction (11a-12a).

From the order dismissing the complaint against the United States, the petitioners appealed to the Court of Appeals for the

Third Circuit. The Court of Appeals, in an unpublished opinion affirmed the District Court.[5]

REASONS FOR GRANTING THE WRIT

I.

The instant decision intensifies a conflict among the Ninth, Fifth and Third Circuits.

In determining whether a district court has jurisdiction of an action under the Federal Tort Claims Act, the Ninth Circuit has developed a test which, if applied to the instant case, would have precluded the entry of summary judgment against the petitioners.

Under the test developed by the Ninth Circuit, the District Court has jurisdiction under the Federal Tort Claims Act if the duty allegedly violated had existence independent of the contract. *Martin v. United States,* 649 F. 2d 701 (C.A. 9, 1981). In the instant case, the tortious conduct of creating false records and blacklisting without an opportunity to respond all occurred after the contract in question was terminated and ceased to exist. Thus, by examination of the chronology, the existence of these duties could not have been dependent upon the contract which had been terminated and ceased to exist. Further, the above duties exist and have as their source not the contract but independent constitutional and common law. *Meyers and Meyers v. U.S. Postal Service,* 527 F. 2d 1252, 1261 (C.A. 2, 1975); *Old Dominion Dairy Products, Inc. v. Secretary of Defense,* 631 F. 2d 953, 968, 969

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5. The Court of Appeals bottomed its decision exclusively on two irrelevant decisions, *American Science & Engineering, Inc. v. Califano,* 571 F. 2d 58 (C.A. 1978) and *Metadure Corp. v. United States,* 490 F. Supp. 1368 (S.D.N.Y. 1980) (*see* page 3 of the Court of Appeals decision at 3a). In neither case was jurisdiction claimed under the Federal Tort Claims Act!

(C.A.D.C., 1980); *Related Industries, Inc. v. United States,* 1 FPD 134 (1983).

Since the duties sought to be enforced under the Federal Tort Claims Act existed independent of the terminated contract, the petitioners here would have fared differently could their action have been brought in the Ninth Circuit.

The test used in the Third Circuit *Aleutco Corp. v. United States,* 244 F. 2d 674 (C.A. 3, 1957) and the Fifth Circuit *United States v. Smith,* 324 F. 2d 622 (C.A. 5, 1973) differ dramatically from the Ninth Circuit test. The Third and Fifth Circuits do not look to see if the duty violated existed irrespective of the contract. Rather they dwell on whether the alleged tort is a "classic" tort or an "ordinary common law" tort.

In *Aleutco Corp. v. United States, supra,* a government contractor who had purchased materials from the government and the government failed to deliver them was permitted to sue under the Federal Tort Claims Act. The court's reasoning was that the contractor should be permitted to waive the contract and sue for conversion. The reasoning was that conversion was considered a "classic" tort.

In the *United States v. Smith* case, *supra,* materialmen sued the United States under the Federal Tort Claims Act for negligently failing to see to it that a government contractor had obtained a materialmen's bond as required by statute. That duty created by statute was obviously independent of the government's contract. The court nevertheless used the fact that this was not an "ordinary common law tort" as a basis for denying jurisdiction.

Although the Second Circuit has addressed the issue in *Putnam Mills Corp. v. United States,* 432 F. 2d 553 (C.A. 2, 1970), it has done it in such a fashion that its denial of jurisdiction

under the Federal Tort Claims Act is ambiguous. In the *Putnam Mills Corp. v. United States* case, a supplier to a government contractor sued SBA. SBA had allegedly promised the supplier that money it paid to the contractor would be put in escrow. Instead the money was paid directly to the contractor and when the contractor defaulted in payments to the supplier, the supplier had no escrowed fund against which to go.

The District Court in the *Putnam* case dismissed the complaint because, even if viewed as a tort action, the action would be in deceit which is obviously excluded by the Federal Tort Claims Act. 28 U.S.C. §2680(h). In affirming the lower court, the Court of Appeals nevertheless obfuscated the decision by reasoning that the claim was also excluded because it was in essence a contract claim.

There therefore exists a conflict among the circuits as to the test to be applied in determining whether a claim sounding in tort is to be excluded because of a surrounding contract setting.

II.

Whether a government contractor who has been victimized by tortious conduct inflicted by government officials with whom he does, has done, or will do contractual business is precluded resort to a United States District Court, is an important question of federal law which should be settled by this Court.

Perhaps much of the confusion over how to determine whether the breach of a given relationship is contractual or tortious can be traced to language no longer appropriate found in this Court's decision in *Dalehite v. United States,* 346 U.S. 15, 28 (1953) suggesting that only "ordinary common law torts" are covered by the Federal Tort Claims Act. *United States v. Smith, supra.* Subsequent developments in both tort law and constitutional

law suggest that any test using a "ordinary common law torts" approach should be reviewed.

Further, the increased volume of contract business done by the United States increases the contacts between government contracting officers and businessmen proportionately, if not geometrically. Because of the pressures of these increased contacts, there is an expanded probability that members of the business community will be injured by tortious conduct resorted to in an effort to control indirectly what cannot be done directly much as the "From Here To Eternity" Army controlled its soldiers, *i.e.*, it could not make them do a given thing but it could make them wish that they had done it.

Surely the plain language of the broad waiver of tort immunity was not intended to discriminate against the business community when it finds that government contracting officers have dealt with them tortiously independent of any contract. Redress to a federal District Court in such situations was clearly intended by Congress.

CONCLUSION

> "The exemption of the sovereign from suit involves hardship enough where consent has been withheld. We are not to add to its rigor by refinement of construction where consent has been announced . . ." Cardozo, J. in *Anderson v. Hays Constr. Co.*, 243 N.Y. 140, 147 (1926).

This Court has pointed out that the Federal Tort Claims Act was not intended for "Simple Simon" construction *Block v. Neal*, ____ U.S. ____, 103 S. Ct. 1089 (1983). Just as in *Block v. Neal, supra,* it was critical to look beyond the mere existence of "deceit" in a case history, so in the instant case it is critical to look beyond the contract to see if tortious conduct was involved.

Indeed the contract versus tort legal muddle which exists today calls for a once and for all decision by this Court much as the once and for all decision rendered concerning the customs exemption to the Federal Tort Claims Act. *Kosak v. United States*, ____ U.S. ____, 104 S. Ct. 1519 (1984).

A review by this Court of this contract versus tort aspect of the Federal Tort Claims Act would be a desideratum not only to the business community but to the entire (business and government) government contract community.

Respectfully submitted,

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APPENDIX

MEMORANDUM OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT FILED MARCH 6, 1984

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 83-1550

KISIELOWSKI, EUGENE and UNITED TEREX, INC.,

Appellants

vs.

UNITED STATES OF AMERICA, HUNT, WILLIAM MERGEL, GEORGE

Appeal from the United States District Court for the Eastern District of Pennsylvania
(D.C. Civil No. 82-3795)
District Judge: Joseph L. McGlynn, Jr.

Submitted Under Third Circuit Rule 12(6)
March 5, 1984
Before: ALDISERT and HIGGINBOTHAM, *Circuit Judges*, and LATCHUM, *District Judge.**
(Filed Mar. 6, 1984)

ALDISERT, *Circuit Judge.*

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* Honorable James L. Latchum, of the United States District Court for the District of Delaware, sitting by designation.

Memorandum Opinion

The major question for decision in this appeal by a government contractor and its chief operating officer from summary judgment is whether the district court correctly dismissed counts in a complaint which alleged a conspiracy to inflict and impose summary punishment, deprivation of property and procedural rights without due process of law, and intentional infliction of mental distress. We find no error in the court's disposition and affirm.

United Terex, Inc., the government contractor, and its chief executive officer sued for $3.3 million from the United States and $6 million from individual defendants, government employees William Hunt and George Mergel, resulting from a government contract awarded it for the manufacture of aerial cargo slings. William Hunt was a contracting officer in St. Louis. During the course of the contract's performance several disputes arose between the contractor and Hunt involving, *inter alia,* a request to disclose the identity of a subcontractor who was to provide metal forgings. Hunt claimed he needed this information to verify the contractor's claim of excusable delay because of a strike. Other disputes between the contract and Hunt concerned the suspension of progress payments, over-payment of progress payments, the validity of a rope testing specification, and whether the contractor had defaulted. Eventually, defendant Hunt terminated the contract for default. Subsequently, the contractor filed suit in the United States Court of Claims under the Contracts Disputes Act of 1978 and appealed the determination for default. That matter is still under litigation. George Mergel was employed as a contracting officer who became involved with a second government bid for the aerial slings.

We first dispose of the contentions relating to the individual defendants Hunt and Mergel. We are satisfied with the court's

determination that Hunt was never personally served with process, and that the factual underpinnings of that determination, were not clearly erroneous. We are satisfied that, under appropriate case law of the Supreme Court and this court, the district court did not err in dismissing the claims against the individual defendants because of lack of personal jurisdiction over them.

We now turn to substantive contentions against the United States. In dismissing Counts I, II, and IV against the government, the court concluded that "these three counts are contract claims cast in tort language. Therefore, I find that I lack subject matter jurisdiction." The court reasoned that under the Tucker Act, 28 U.S.C. §§1346(a)(2) and 1491, the United States Claims Court has exclusive jurisdiction over claims in excess of $10,000 against the United States and its agencies "founded either upon the Constitution, or any Act of Congress, or any regulation of an executive department, or upon any express or implied contract with the United States. . . ." For claims arising prior to March 1, 1979, district courts have concurrent jurisdiction with the Claims Court to decide cases involving claims for less than $10,000. For claims arising thereafter, jurisdiction over contract claims covered by the Contract Disputes Act of 1978, 41 U.S.C. §§601-613, have been removed from the district courts.

Appellants vigorously argue that these are tort actions and not contract claims. We believe that the rationale in *American Science & Engineering, Inc. v. Califano,* 571 F.2d 58 (1st Cir. 1978), and *Metadure Corp. v. United States,* 490 F. Supp. 1368 (S.D. N.Y. 1980), incline our decision here adversely to appellants.

Appellant Kisielowski charged in the complaint's Count V that the United States intentionally inflicted mental distress. The district court acknowledged that this cause of action may be

cognizable under the Federal Torts Claim Act. The court drew an analogy to Pennsylvania tort law:

> To state a claim for intentional infliction of mental distress in Pennsylvania, four elements must be shown: "(1) the conduct must be extreme and outrageous; (2) the conduct must be intentional or reckless; (3) it must cause emotional distress, and (4) the distress must be severe." *Chuy v. Philadelphia Eagles Football Club,* 595 F.2d 1265, 1273 (3d Cir. 1979). I need go no further than the first criterion to conclude plaintiff has failed to state a claim.

App. at 166. In addition the court relied upon the RESTATEMENT (SECOND) OF TORTS §46 comment d (1965):

> Liability has been found only where the conduct has been so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community. Generally the case is one in which the recitation of the facts to an average member of the community would arouse his resentment against the actor, and lead him to exclaim, "Outrageous!"

We have carefully examined relevant case law, including *Cautilli v. GAF Corp.,* 531 F. Supp. 71, 73 (E.D. Pa. 1982), written by our colleague Judge Becker when he served as a district judge. We have concluded that the alleged conduct, even if proven to be true, is plainly not of the "extreme and outrageous" type as to be actionable as a matter of law.

Memorandum Opinion

We have carefully considered all the contentions of the appellants. The judgment of the district court will be affirmed in all respects.

TO THE CLERK:

Please file the foregoing opinion.

s/ Aldisert
Circuit Judge

MEMORANDUM DECISION AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA DATED JUNE 22, 1983

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

No. 82-3795

EUGENE KISIELOWSKI and UNITED TEREX, INC.,

v.

UNITED STATES OF AMERICA, WILLIAM HUNT and GEORGE MERGEL,

McGLYNN, J.

June 22, 1983

In 1979, the plaintiff United Terex, Inc. ("UTI") of which the plaintiff Eugene Kisielowski was the president and chief executive officer, was awarded a contract by the United States Army Aviation Research and Development Command ("AVRADCOM") for aerial cargo slings. The contracting officer at the time was the defendant William Hunt. Disputes arose between the plaintiffs and Hunt which ultimately caused Hunt to terminate the contract. Defendant George Mergel, a contract officer with the United States Army Troop Support and Aviation Material Readiness Command ("TSARCOM") was responsible for procuring the slings which UTI were to have made under the terminated contract. Mergel issued an invitation to bid which UTI and seven other companies responded. Although the lowest bidder was UTI, Mergel doubted UTI's integrity because of the problem with the terminated AVRADCOM contract. As required, Mergel referred the matter to the Small Business Administration which

declined to certify UTI's competency. Mergel retired before the final decision was made not to award UTI this contract.

In August of 1982, plaintiffs filed this suit alleging that the defendants Hunt, Mergel and the United States committed numerous intentional torts against them. Specifically plaintiffs allege that the defendants conspired to summarily punish the plaintiffs, imposed summary punishment, interfered with plaintiffs' prospective advantage, violated plaintiffs' due process rights, intentionally inflicted mental distress on the individual plaintiff and uttered and published an injurious falsehood about both plaintiffs.

The defendants have moved to dismiss or in the alternative for summary judgment based on several grounds: (1) lack of subject matter jurisdiction; (2) lack of personal jurisdiction over Hunt and Mergel; (3) insufficient service of process as to defendants Hunt and Mergel; (4) improper venue; (5) immunity; (6) failure to state a claim upon which relief can be granted; and (7) that plaintiffs' claim for injurious falsehood is barred by the statute of limitations. I have decided to grant defendants' motion for the reasons set forth below.

Defendants Hunt and Mergel

Service

Both Hunt and Mergel seek dismissal under rule 12(b)(5) based on insufficiency of service. Hunt avers that he has not been properly served. Mergel states he has not been served at all.

Memorandum Decision

Service of process is governed by rule 4 of the Federal Rules of Civil Procedure.[1] Rule 4 sets forth several methods for serving a summons and complaint, some of which are pertinent here. Rule 4(d)(1) states service is proper if the papers are delivered personally upon the defendant. In addition, rule 4(d)(7) permits service in any "manner prescribed by the law of the state in which the district court is held. . . " Thus service is also proper if allowed by Pennsylvania rule or statute.[2]

In this case, the Marshal's return of service form indicates that Hunt was personally served on September 9, 1982. Hunt, however, states in a declaration that he was never personally served. Instead, he says that the summons and complaint were left by a person identifying himself as a federal marshal with his supervisor's secretary at his place of employment on September 22, 1981. Declaration of William Hunt ¶14. This method of service Hunt asserts is not permitted either under federal rule 4, Pennsylvania's long-arm statute, 42 Pa. C. Stat. Ann. §5323 and rules of civil procedure 1009 and 2079, or the applicable statute in Missouri which is in this case adopted by Pennsylvania. 42 Pa. Cons. Stat. Ann. §5323(a)(2); Pa. R. Civ. P. 2079(c)(2).

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1. The purported service on Hunt took place prior to the recent amendments to rule 4 which became effective in February of this year. Therefore, my analysis will involve the rule prior to these amendments.

2. Although rule 4(d)(5), which provides that service upon an officer of the United States may be made by "serving the United States and by delivering a copy of the summons and of the complaint to such officer," seems at first glance applicable here, the Third Circuit has held this method insufficient when a plaintiff seeks money damages from public officials in their individual capacity. Micklus v. Carlson, 632 F. 2d 227, 240 (3d Cir. 1980). *Accord,* Griffith v. Nixon, 518 F. 2d 1195, 1196 (2d Cir.), *cert. denied*, 423 U.S. 995 (1975); Relf v. Gasch, 511 F. 2d 804, 808 n. 18 (D.C. Cir. 1975).

Although Hunt has only sought dismissal under rule 12(b)(5), the court has discretion to treat it as a motion to quash service. *See generally*, 5 C. Wright & A. Miller, *Federal Practice and Procedure* §1354 (1969 & Supp. 1982). This is especially true where there is a reasonable prospect that plaintiff will ultimately serve the defendant properly. *Id. See Croy v. Skinner*, 410 F. Supp. 117, 130-32 (N.D. Ga. 1976). Such is the case with respect to Hunt. Therefore, I will treat his request as a motion to quash service of process. *See Peterson v. Dickison*, 334 F. Supp. 551, 554 (W.D. Pa. 1971).

The marshal's return is prima facie evidence that Hunt was personally served. *See* C. Wright & A. Miller, *supra,* §1353, at 582 & n. 2. However, the defendant may introduce an affidavit to rebut that evidence which, if uncontroverted by plaintiff, will be deemed admitted for purposes of the motion. *Id.* at 582-83 & n. 3. *See Grantham v. Challenge-Cook Bros., Inc.*, 420 F. 2d 1182, 1186 (7th Cir. 1969); *Shires v. Magnavox Co.*, 74 F.R.D. 373, 377 (E.D. Tenn. 1977).

In this case Hunt has stated in an unsworn declaration under penalty of perjury that he was not personally served but that the summons and complaint were left with his supervisor's secretary. Although this evidence is not presented in affidavit form, it is in a form deemed equivalent by statute. *See* 28 U.S.C. §1746. This declaration is buttressed by the sworn statement of the secretary that she received the summons and complaint. Affidavit of Loretta Harris ¶2. Plaintiff has neither rebutted this in any form nor requested discovery or a hearing on this issue. Thus Hunt's declaration will be deemed admitted. What remains is to determine whether service on Hunt's supervisor's secretary is an acceptable method of service under the applicable rules and statutes.

Memorandum Decision

No provision of either federal rule 4 or the Missouri statute applicable here under Pennsylvania law authorizes service of a defendant by leaving it with a supervisor's secretary at the defendant's workplace. *See* Mo. Ann. Stat. §506.150. Rule 1009 of the Pennsylvania rules of civil procedure does contain a provision which is worthy of attention, however. Rule 1009(b)(2)(iii) provides:

> (b) When the defendant is an individual, the writ of summons, or the complaint if the action is commenced by complaint, may be served.
>
> * * * *
>
> (2) by handing a copy
>
> * * * *
>
> (iii) at any office or usual place of business of the defendant to his agent or to the person for the time being in charge thereof.

I do not believe plaintiff has shown that the supervisor's secretary is either Hunt's agent[3] or the person for the time being in charge of the office. Moreover, according to Pennsylvania law this rule permits service at a defendant's place of business only where the defendant has more proprietary responsibility and control over the business than that possessed by an average employee. *See Pincus v. Mutual Assur. Co.*, 457 Pa. 94, 321 A. 2d 906 (1974) (service on corporation's trustees under this statute permitted); *Sharp v. Valley Forge Medical Center and Heart Hospital, Inc.*,

3. Hunt specifically denies any agency relationship. Hunt Declaration ¶14.

422 Pa. 124, 221 A. 2d 185 (1966) (rule does not provide for service at "place of employment"); *Slater v. Goldberg,* 266 Pa. Super. Ct. 52, 402 A. 2d 1073 (1979) (sole stockholders who were also officers and directors of corporation had enough proprietary control to permit service under rule); *City of Philadelphia v. Campbell,* 32 Pa. Commw. Ct. 166, 378 A. 2d 1043 (1977) (service on the supervisor of employee of United States Naval shipyard invalid). *Accord, Goodman v. Moyer,* 523 F. Supp. 33 (E.D. Pa. 1981); *Leshko v. Dorr-Oliver, Inc.*, 86 F.R.D. 343 (M.D. Pa. 1980). I am not persuaded that a contract officer such as Hunt has the requisite proprietary control over the business of the United States Army Aviation Research and Development Command to come within this statute. Therefore, I conclude Hunt was not properly served and service of process will be quashed. However, because it is likely that proper service can be made on Hunt, I will exercise my discretion and not dismiss plaintiffs' complaint against Hunt on this ground.

The circumstances surrounding Mergel are different. It is undisputed that no service has been made upon him. From the record before me, service was attempted on him only once at his former place of employment. Because Mergel had retired prior to the attempted service, service was unsuccessful. There is no evidence in the record that plaintiffs had made any attempt to locate Mergel although it appears from a declaration filed by Mergel in this action that he is a resident of St. Louis, Missouri. Because the plaintiffs have been dilatory and unagressive in their attempt to serve Mergel, I believe dismissal is warranted under rule 12(b)(5).

Personal Jurisdiction

A more compelling reason exists to dismiss the complaint as against defendants Hunt and Mergel. Even assuming proper

service had been made on both, I believe this court lacks personal jurisdiction over them.

Any decision concerning a personal jurisdiction question over nonresidents involves a two-step analysis. First the defendant's acts must come within the relevant state's long-arm statute. Second, jurisdiction over a nonresident must be constitutionally permissible. Because Pennsylvania's long-arm statute permits jurisdiction over all persons to the fullest extent allowed under the constitution, *see* 42 Pa. Cons. Stat. Ann. §5322(b), I need only conduct an analysis under the second step in order to ascertain whether personal jurisdiction exists over Hunt and Mergel.

Although a state's power to assert personal jurisdiction over a nonresident defendant has significantly expanded since the time of *Pennoyer v. Neff*, 95 U.S. 714 (1878), the Supreme Court in recent years has recognized that this power is not unbounded. *See Rush v. Savchuk*, 444 U.S. 320 (1980); *World-Wide Volkswagen Corporation v. Woodson*, 444 U.S. 286 (1980); *Kulko v. Superior Court of California*, 436 U.S. 84 (1978); *Shaffer v. Heitner*, 433 U.S. 186 (1977); *Hanson v. Denckla*, 357 U.S. 235 (1958). The reason for limits on this power was aptly stated in *Hanson v. Denckla, supra*:

> But it is a mistake to assume that this trend heralds the eventual demise of all restrictions on the personal jurisdiction of state courts. . . . Those restrictions are more than a guarantee of immunity from inconvenient or distant litigation. They are a consequence of territorial limitations on the power of the respective States. However minimal the burden of defending in a foreign tribunal, a defendant may not be called upon to do so unless

> he has had the "minimal contracts" with that State that are a prerequisite to its exercise of power over him.

357 U.S. at 251 (citations omitted). Thus, out of concern for maintenance of federalism as well as a primary concern for the burden on a defendant being hauled into a foreign forum, the Supreme Court has recognized that the due process clause of the 14th amendment requires that a nonresident defendant have sufficient contacts with the forum state so as not to violate recognized standards of "fair play and substantial justice." *Hanson v. Denckla, supra; McGee v. International Life Insurance Company*, 355 U.S. 220 (1957); *International Shoe Company v. Washington*, 326 U.S. 310 (1945); *Insurance Company of North America v. Marina Salina Cruz*, 649 F. 2d 1266 (9th Cir. 1981).

Both Hunt and Mergel have filed declarations under penalty of perjury that they have no contacts with Pennsylvania. Hunt declares: "I am presently a resident of the State of Missouri, and have been for the past 57 years. To the best of my knowledge I have had no personal contacts with the State of Pennsylvania, having never resided, owned property, or conducted a personal business within that state." Hunt Declaration ¶13. Similarly Mergel declares:

> I am a citizen of the State of Missouri, presently residing in the St. Louis metropolitan area. Other than for a brief period while serving on active duty in the Armed Forces of the United States, I have been a resident of Missouri for the last 65 years. Additionally, to the best of my knowledge, I have had no personal contacts with the State of Pennsylvania, having never resided,

> owned property, or conducted a personal business within the state.

Mergel Declaration ¶9. Nonetheless, plaintiffs argue that jurisdiction exists over them because they "purposefully aimed their *intentional* conduct at a resident of the Eastern District of Pennsylvania." Plaintiffs' Brief and Affidavit (In Two Volumes) Contra Defendants' Motion to Dismiss and For Summary Judgment, at 9, *citing Worldwide Volkswagen Corp. v. Woodson, supra* (emphasis in original). I find this argument unpersuasive.

The court's decision in *Aamco Automatic Transmissions, Inc. v. Tayloe*, 368 F. Supp. 1283 (E.D. Pa. 1973) is instructive. There the defendants including one individual were said by plaintiff to have engaged in a conspiracy and intentionally interferred with contractual relations causing plaintiff a loss of income and profits as well as damage to plaintiff's trade name and reputation. Under the Pennsylvania concept of "place of the tort," the defendants were deemed to have committed these torts within the Commonwealth because that was the place of injury. Defendants otherwise had no contacts with Pennsylvania. The court had no trouble deciding there was no personal jurisdiction:

> The only acts performed by defendants within the State of Pennsylvania are the constructive commission of the asserted torts. Defendants are not alleged to have done any other act or acts within this state, whether past or current, business or personal, direct or indirect, constructive or actual by which the benefits and protections of Pennsylvania law were bestowed upon them. Under the facts of this case, it cannot be said that defendants, by this constructive tortious conduct,

> have "purposefully availed" themselves of the "privilege of conducting activities" in Pennsylvania or received the "benefits or protections" of its laws.

Id. at 1298-99[4]. *Cf. Rogers v. Icelander/Flugleider, International*, 522 F. Supp. 670 (E.D. Pa. 1981) (where defendants accused of wrongful termination of employment contract and only contact with Pennsylvania was that resulting harm was in Commonwealth, defendants had not purposefully availed themselves of privileges afforded by Pennsylvania law).

The dearth of contacts between Pennsylvania and each of the individual defendants which plaintiffs do not dispute compels me to conclude that personal jurisdiction over them is lacking.[5] Therefore dismissal as against Hunt and Mergel is warranted.[6]

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4. The court also found that the "single occurrence in Pennsylvania (harm to plaintiff) [fails to] constitute[] a '*substantial connection*' under *McGee* sufficient to justify the exercise of jurisdiction over these defendants." 368 F. Supp. at 1298.

5. I agree with the defendants' position that any contacts these defendants may have had with Pennsylvania while acting in their official capacities may not be considered where personal liability is sought. *Cf.* Forsythe v. Overmyer, 576 F. 2d 779 (9th cir.), *cert. denied*, 439 U.S. 864 (1978); Chem Lab Products, Inc. v. Stepanek, 554 F. 2d 371 (9th Cir. 1977); Martin v. Sturm, Ruger & Co., 548 F. Supp. 1 (E.D. Pa. 1981); Stop-A-Flat Corp. v. Electra Start, 507 F. Supp. 647 (E.D. Pa. 1981) (no personal jurisdiction where individual liability is sought over corporate officers whose only contacts with forum were in performance of official duties); Micklus v. Carlson, 632 F. 2d at 240 (service on public officials in individual capacities governed by rules covering individuals, not rule for service on officers of United States).

6. Because of my finding that personal jurisdiction over Hunt and Mergel is lacking, I need not decide whether they are immune from suit, whether venue is improper or whether count six is barred by the statute of limitations.

Moreover, because plaintiffs' claim in count six for injurious falsehood is asserted against only Hunt and Mergel, it will be dismissed.

The United States

In order to maintain a tort suit against the United States, the United States must waive its sovereign immunity. *See United States v. Mitchell*, 445 U.S. 535, 538 (1980). The Federal Tort Claims Act ("FTCA") has such a waiver: "The United States shall be liable, respecting the provisions of this title relating to tort claims, in the same manner and to the same extent as private individual under like circumstances . . . ." 28 U.S.C. §2674. This waiver has numerous exceptions. One such exception is contained in 28 U.S.C. §2680(h) which in effect provides that "[a]ny claim arising out of. . .libel, slander, misrepresentation, deceit, or interference with contract rights. . ." is barred by sovereign immunity. It is my conclusion that this exception bars plaintiffs' claims for interference with prospective advantage.

In *Taxay, M.D. v. United States*, 345 F. Supp. 1284 (D.D.C. 1972), *aff'd mem.*, 487 F. 2d 1214 (D.C. Cir. 1974), the plaintiff had been an Aviation Medical Examiner with the Federal Aviation Administration until the FAA failed to renew his appointment. This failure, plaintiff asserted, was a wrongful and intentional interference with his prospective business advantage. The court concluded that this claim was covered by the "interference with contract rights" portion of §2680(h) and dismissed plaintiff's complaint. Our own Court of Appeals in *Dupree v. United States*, 264 F. 2d 140, (3d Cir.), *cert. denied*, 361 U.S. 823 (1959), held that §2680(h) barred a suit by a seaman for interference with prospective economic advantage. The court found:

> "Both the tort of interference with contract relations and the tort of interference with prospective contract or business relations involve basically the same conduct on the part of the tortfeasor. In one case the interference takes place when a contract is already in existence, in the other, when a contract would, with certainty, have been consummated but for the conduct of the tortfeasor. (See Prosser on Torts, p. 720 et seq., and p. 745 et seq. [2d Ed. 1955]. Rather than characterizing the two as separate torts, the more rational approach seems to be that the basic tort of interference with economic relations can be established by showing, *inter alia,* an interference with an existing contract or a contract which is certain to be consummated, with broader grounds for justification of the interference where the latter situation is presented."

Id. at 144 *quoting Builders Corporation of America v. United States,* 148 F. Supp. 482, 484 n.1. (N.D. Cal. 1957), *rev'd on other grounds,* 259 F.2d 766 (9th Cir. 1958).

The reasoning in these cases in persuasive. Therefore, I will dismiss count three of plaintiffs' complaint.

I also believe count three should be dismissed because plaintiffs have failed to exhaust their administrative remedies. The FTCA requires that before an action is commenced the aggrieved person must present his claims to the appropriate federal agency. 28 U.S.C. §2675(a). Plaintiffs through their counsel submitted two claims to the Secretary of the Army.[7] *See* Exhibits A & B

7. I am assuming here that these two claims otherwise met all the criteria for submissions to the relevant federal agency as required. Defendants assert that they did not.

to Complaint. Neither mentioned any claim for interference with prospective business advantage or words to that effect. This failure precludes plaintiffs' asserting one in this action.

Although the exceptions contained in §2680(h) have been held not to bar a claim for intentional infliction of mental distress, *see Gross v. United States,* 676 F.2d 295, 303-04 (8th Cir. 1982), I nevertheless have concluded that Kisielowski's claim in count five must be dismissed for failure to state a claim upon which relief can be granted. In count five, it is not clear whether plaintiff merely alleges a violation of state tort law which can be asserted against the United States due to the FTCA or whether he is asserting a constitutional violation based on the same conduct. In either event, plaintiff cannot prevail.

To state a claim for intentional infliction of mental distress in Pennsylvania, four elements must be shown: "(1) the conduct must be extreme and outrageous; (2) the conduct must be intentional or reckless; (3) it must cause emotional distress, and (4) the distress must be severe." *Chuy v. Philadelphia Eagles Football Club,* 595 F.2d 1265, 1273 (3d Cir. 1979). I need go no further than the first criterion to conclude plaintiff has failed to state a claim.

The Restatement (Second) of Torts (1965) would place liability only on persons whose conduct is extraordinarily despicable:

> Liability has been found only where the conduct has been so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community. Generally the case is one in which the

> recitation of the facts to an average member of the community would arouse his resentment against the actor, and lead him to exclaim, "Outrageous!"

Id. § 46 comment d. The fact that a defendant acted with malice or specific intent to cause distress is in and of itself insufficient to justify the imposition of liability. *Curran v. Dural,* 512 F. Supp. 699, 704 (E.D. Pa. 1981).

In *Cautilli v. GAF Corp.,* 531 F. Supp. 71 (E.D. Pa. 1982), District Judge, now Circuit Judge, Becker noted that "[c]ourts have steadfastly refused to extend the scope of this tort to anything but the most extreme and outrageous forms of misconduct." *Id.* at 73. The court cited examples of conduct which were found to be outrageous: (1) the withholding and concealing of the body of a couple's dead child, *Papieves v. Lawrence,* 437 Pa. 373, 263 A.2d 118 (1970); (2) a football team's doctor's telling reporters that a player had a potentially fatal rare blood disease knowing that the statement was baseless, *Chuy v. Philadelphia Eagles Football Club, supra;* and (3) a doctor's telling parents that their child may have cancer knowing the child merely had an infected appendix, *Hume v. Bayer,* 157 N.J. Super. 310, 428 A.2d 966 (1981). *See Banyas v. Lower Bucks Hospital,* 293 Pa. Super. Ct. 122, 437 A.2d 1236 (1981) (intentionally or recklessly attributing a person's death to plaintiff who in fact was not at all responsible for the death). By comparison the plaintiff in Cautilli alleged he was intentionally induced to commit himself to the defendant's employ in a division of the defendant so as to raise the sale price of the division which sale if concluded would be detrimental to plaintiff's career. The court had no trouble deciding to dismiss the plaintiff's claim under rule 12(b)(6) even though the defendant's conduct, if proven, would be offensive and unfair. The court also

believed that this tort would not be extended to cover employment contract disputes.

By no stretch of the imagination can count five be said to state a cause of action for this tort. Assuming as I must that everything in the complaint is true, Hunt and Mergel as agents for the United States maliciously and intentionally and without cause made unreasonable requests of plaintiff in violation of his contract rights. These included, plaintiff avers, that the defendants forced UTI to reveal its forging supplier which plaintiff contends is proprietary information and tried to compel UTI to give up any claims it might have had for the cost of implementing changes in the design specifications. Furthermore, plaintiff continues, Hunt and others knowingly made false statements to other government agencies that plaintiffs had defrauded the government. These actions, plaintiff concludes, resulted in the wrongful termination of the contract and caused UTI to not receive the contract to manufacture aerial slings Mergel was in charge of awarding even though UTI was the lowest bidder. Even if all this were true, this conduct, although improper and unacceptable, fails to rise to the outrageous level as represented in the *Papieves, Chuy, Hume,* and *Banyas* cases discussed above.

If plaintiff is seeking in count five to claim recovery based on the constitution, he must also fail. Where a plaintiff pursues a claim for a "constitutional tort," the burden on plaintiff is higher than it would be to prove the comparable state law tort. *Cf. Romeo v. Youngberg,* 644 F.2d 147, 156 & 177 (3d Cir. 1980) (en banc) (Adams, J. for the majority and Seitz, C.J. for the concurrence), *rev'd on other grounds,* 457 U.S. , 73 L.Ed. 2d 28 (1982) (Supreme Court approved standard enunciated in Chief Judge Seitz' concurring opinion which placed higher burden of proof on plaintiff than that majority would have required in §1983

case); *Paul v. Davis,* 424 U.S. 693 (1976). Having failed to state a cause of action even for a state law tort, plaintiff cannot be said to have successfully stated one based on the constitution. Therefore, count five will be dismissed.

What remains then are counts one, two and four which allege the United States conspired to inflict and did impose summary punishment and deprived plaintiffs of property and procedural rights without due process of law. I believe these three counts are contract claims cast in tort language. Therefore, I find that I lack subject matter jurisdiction.

Prior to the enactment of the Contract Disputes Act of 1978, 41 U.S.C. §§601-13, the jurisdiction of district courts where the United States is a defendant in a contract dispute was governed by 28 U.S.C. §1346 which provides that district courts have concurrent jurisdiction with the Court of Claims (now the United States Claims Court) in "any . . . civil action or claim against the United States, not exceeding $10,000 in amount, founded either upon the Constitution, or any Act of Congress, . . . or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort. . . 28 U.S.C. §1346(a)(2). Any claim for a higher amount based on a government contract could only be heard in the Court of Claims. *See* 28 U.S.C. §1491. For claims arising after the effective date of the Contract Disputes Act of 1978, March 1, 1979, actions can only be commenced in a government contract case in the United States Claims Court. *See* 41 U.S.C. §609(a). Plaintiffs' claims arose after March 1, 1979 and exceed $10,000. Thus if properly characterized as contract claims, I have no jurisdiction to entertain counts one, two and four.

Defendants cite some cases for the proposition that courts will not be fooled by contract claims disguised as tort claims. *See American Science & Engineering, Inc. v. Califano,* 571 F.2d 58 (1st Cir. 1978); *International Engineering Co. v. Richardson,* 512 F.2d 573 (D.C. Cir. 1975), *cert. denied,* 423 U.S. 1048 (1976); *Metadure Corp. v. United States,* 490 F. Supp. 1368 (S.D.N.Y. 1980). Plaintiffs protest that none of these cases involves claims made under the FTCA. It is a distinction without a difference. Several courts have reached the same conclusion where plaintiffs seek to invoke the FTCA for claims which are in truth contract disputes. The case of *Woodbury v. United States,* 313 F.2d 291 (9th Cir. 1963) is one example.

The court in *Woodbury* faced a claim made under the FTCA against the Housing and Home Finance Agency for what plaintiff characterized as its breach of a fiduciary duty to arrange for long-term financing of plaintiff's construction of housing at a naval base. The court, however, saw things differently:

> Many breaches of contract can also be treated as torts. But in cases such as this, where the "tort" complained of is based entirely upon breach by the government of a promise made by it in a contract, so that the claim is in substance a breach of contract claim, and only incidentally and conceptually also a tort claim, we do not think that the common law or local state law right to "waive the breach and sue in tort" brings the case within the Federal Tort Claims Act. The notion of such waiver of breach and suit in tort is a product of the history of english forms of action: it should not defeat the long established policy that government contracts are to be given a uniform

> interpretation and applications under federal law, rather than being given different interpretations and applications depending upon the vagaries of the laws of fifty different states.

Id. at 295. *See Putnam Mills Corp. v. United States,* 432 F.2d 553 (2nd Cir. 1970); *United States v. Smith,* 324 F.2d 622 (5th Cir. 1973); *Johnson v. Secretary of/and U.S. Dept. of Housing and Urban Development,* 544 F. Supp. 925 F. Supp. 777 (S.D. Ga. 1981).

Granted, not all claims which spring from a contractual relationship should be considered contract claims. For example, in *Aleutco Corp. v. United States,* 244 F.2d 674 (3d Cir. 1957), the plaintiff purchased surplus war materials in the Aleutian Islands from the government. However, when plaintiff tried to pick up these materials, the government refused to permit it and sold the materials to someone else. Plaintiff brought suit under the FTCA for the government's alleged conversion of plaintiff's property. The court undertook an analysis of the nature of plaintiff's complaint and found that it stated a "classic case in tort" even though it sprung from a contractual relationship. Similarly the court held in *Martin v. United States,* 649 F.2d 701 (9th Cir. 1981), that a claim for personal injuries caused by negligent performance of a government contract may be brought under the FTCA. *See Walsh v. United States,* 672 F.2d 746 (9th Cir. 1982).

Whether counts one, two and four can proceed under the FTCA requires a determination of whether they are essentially ones sounding in tort or in contract. In my judgment, they are contractual claims. Counts one and two allege a "conspiracy to summarily punishment" and the "infliction of summary punishment." The "punishment was in reality the termination

of plaintiffs' AVRADCOM contract and the refusal to award them the TARARCOM Contract. Count four asserts that various actions of the defendants deprived the plaintiffs of property and procedural rights in the administration and termination of the AVRADCOM contract and by the refusal to consider the plaintiffs for the TSARCOM contract. These claims are more akin to those in *Woodbury* than those in the *Aleutco Corp.* line. As a result, I conclude that I have no jurisdiction to hear these counts.[8]

Having found that none of plaintiffs' claims can proceed, I will grant the defendants' motion. An appropriate order follows.

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8. Having reached this conclusions, I need not decide defendants' other contentions.

Memorandum Decision

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

CIVIL ACTION

NO. 82-3795

EUGENE KISIELOWSKI and UNITED TEREX, INC.,

vs.

UNITED STATES OF AMERICA, WILLIAM HUNT and GEORGE MERGEL

ORDER

AND NOW, this 22nd day of June, 1983, upon consideration of Defendants' Motion to Dismiss or, in Alternative, for Summary Judgment and plaintiffs' response thereto, it is hereby

ORDERED

that said motion is granted. Plaintiffs' complaint against the United States is DISMISSED with prejudice; plaintiffs' complaint against defendants Hunt and Merge is DISMISSED without prejudice.

BY THE COURT

s/ JOSEPH L. McGLYNN, JR.
J.

Entered: 6-23-83

PLAINTIFFS' COMPLAINT IN TRESPASS

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

No. 82-3795

Eugene Kisielowski
and
United Terex, Inc.,

Plaintiffs,

V.

United States of America
and
William Hunt
and
George Mergel,

Defendants.

JURY TRIAL DEMANDED

COMPLAINT IN TRESPASS

Jurisdiction

1. The jurisdiction of this court against the United States is based on 28 USC 1331; 28 USC 2671 et seq.; the 1st, 4th, 5th and 8th Amendments of the United States Constitution.

2. The jurisdiction against the individual defendants is based on 28 USC 1331; 28 USC 1332(a)(1); the 1st, 4th, 5th and 8th Amendments of the United States Constitution.

3. Administrative claims covering the actions against the United States were filed by the plaintiffs with the appropriate agencies of the United States (see attached Exhibits A & B) and were denied by letter dated March 1, 1982. (see attached Exhibit C)

Parties Plaintiff

4. United Terex, Inc. (hereafter referred to as UTI) is a Pennsylvania small business corporation residing in the Eastern District of Pennsylvania which manufacturers such items as air drop platforms, tool repair cabinets and air delivery and recovery systems for agencies of the U.S. Government.

5. Eugene Kisielowski is an individual residing in the Eastern District of Pennsylvania with mechanical and aeronautical engineering degrees and is employed by UTI as its president and chief operating officer.

Parties Defendant

6. The United States is a sovereign and embraces as federal agencies the United States Army Aviation Research and Development Command (hereafter AVRADCOM) and the United States Troop Support and Aviation Materiel Readiness Command (hereafter TSARCOM).

7. William Hunt is employed by the U.S. Government and is clothed and acts with the authority of an AVRADCOM Contracting Officer.

8. George Mergel was an employee of the United States Government who was clothed and acted with the authority of an AVRADCOM Contracting Officer. He resides in Missouri.

Complaint in Trespass

COUNT I

Conspiracy to Summarily Punish
Both Plaintiffs Against All Defendants

9. Plaintiffs reallege paragraphs 1 through 8.

10. From on or about October 24, 1980 to the present defendants have conspired to inflict summary punishment upon plaintiffs for plaintiffs' reluctance to disclose proprietary information and for plaintiffs' refusal to execute an agreement waiving UTI's claim for additional costs caused by a correction to defective Government specifications.

11. It was and is the plan and purpose of the conspiracy to punish plaintiffs with a *de facto* debarment preluding UTI from obtaining Government contracts for the manufacture of air delivery and recovery systems for AVRADCOM and TSARCOM.

12. It was and is the further plan and purpose of the conspiracy to punish plaintiffs with economic reprisals and administrative harassment for plaintiffs' attempts to exercise their contract statutory and constitutional rights.

13. As part of defendants plan to inflict summary punishment and economic reprisals the defendants commited the following overt acts:

(a) On or about October 22, 1980 Hunt and others presently unknown unreasonably insisted that UTI reveal its forging supplier, information which by custom and usage is considered proprietary.

(b) On or about November 1, 1980, when UTI declined to disclose the name of its forging supplier, Hunt wrongfully suspended progress payments to UTI.

(c) On or about January 13, 1981 after acknowledging the Government rope testing specification was defective, Hunt and others presently unknown attempted to compel plaintiffs to give up any and all claims UTI might have in implementing the change required because of the defective specification.

(d) On or about February 27, 1981 Hunt and others presently unknown in an effort to set up UTI for a termination (albeit illegal termination) improperly instructed the Administrative Contracting Officer to take no action on UTI's offer to satisfy the ACO as to disputed progress payments, thereby foreclosing UTI's ability to repay or settle any disputed progress payments.

(e) On or about March 18, 1981 Hunt and others presently unknown wrongfully terminated UTI's contract to manufacture aerial cargo slings citing as a justification UTI's failure to deliver a first article test report by February 13, 1981 when in fact Hunt knew that UTI had been relieved of any duty to deliver a first article test report by that date or by any other specific date.

(f) On or about December 8, 1981 Mergel and others presently unknown rejected UTI's proposal to manufacture aerial slings despite the Government's affirmative recognition of UTI's integrity and an independent SBA finding of sufficient UTI capacity.

(g) On or about February 1, 1981 Hunt and others presently unknown intentionally formulated and forwarded to

other government agencies injurious false information regarding UTI's purchase of rope from Elisha Webb (UTI's rope supplier) in order to make it appear that UTI had no commitment for rope and had paid no money to Elisha Webb, and had thus defrauded the Government.

COUNT II

Ifliction of Summary Punishment

Both Plaintiffs Against All Defendants

14. Plaintiffs reallege paragraphs 1 through 13.

15. During the period March 18, 1981 to the present defendants inflicted summary punishment upon plaintiffs by: (a) willfully terminating UTI's right to sell aerial slings to the Government under contract DAAK50-79-C-0037 as more fully described in paragraph 13 above; and (b) willfully refusing to accept qualified bids from UTI for the manufacture of aerial cargo slings all of which jeopardized UTI's existence and Eugene Kisielowski's physical, emotional, mental and financial well being.

COUNT III

Interference With Prospective Advantage

Both Plaintiffs Against All Defendants

16. Plaintiffs reallege paragraphs 1 through 15.

17. UTI and its predecessors have since 1971 successfully performed on over 60 government contracts with such government

agencies as NASA, the U.S. Navy as well as AVRADCOM and TSARCOM.

18. In so doing, plaintiffs had established a reputation within the government procurement industry for integrity and capability.

19. With this reputation repeatedly confirmed by the award of over 60 or more contracts, plaintiffs enjoyed an advantage in obtaining customers, employment and financing.

20. Because of the conduct of all the defendants as specifically set forth, this advantage has been adversely affected, accounting for for plaintiffs' inability to acquire (a) Certificates of Competency from SBA on aerial sling contracts; (b) new aerial cargo sling contracts; and (c) new military and civilian business.

COUNT IV

Due Process

Both Plaintiffs Against All Defendants

21. Plaintiffs reallege paragraphs 1 through 20.

22. By improperly pressuring UTI to release in advance any and all claims caused by the government's remedying its defective specification; by forcing under threat of termination UTI's offer to disclose proprietary information; and by directing the UTI's offer to resolve the disputed progress payments issue not be considered; by refusing to consider UTI for the award of sling contracts; by utilizing the termination machinery to punish plaintiffs, the defendants have deprived plaintiffs of both property and procedural rights without due process.

Complaint in Trespass

COUNT V

Intentional Infliction of Mental Distress

Plaintiff Kisielowski Against All Defendants

23. Plaintiffs reallege paragraphs 1 through 22.

24. By willfully and without foundation in fact publicly impugning Plaintiff Kisielowski's integrity and his ethics, by willfully without foundation in fact terminating UTI's contract, Defendants intentionally inflicted mental distress upon Plaintiff Kisielowski.

COUNT VI

Injurious Falsehood

Both Plaintiffs Against Individual Defendants

25. Plaintiffs reallege paragraphs 1 through 24.

26. In willfully misrepresenting UTI's contractual relationship with Elisha Webb, Defendants by uttering and publishing an injurious falsehood to wit that UTI had given Elisha Webb no money; had not formally ordered anything; and yet requested and received progress payments, the individual defendants defamed the plaintiffs.

WHEREFORE, (a) Plaintiff UTI demands from the United States $2,100,000.00;

(b) Plaintiff Kisielowski demands from the United States $1,200,000.00;

(c) Plaintiff UTI demands from the individual defendants $2,500,000.00; and

(d) Plaintiff Kisielowski demands from the individual defendants $3,500,000.00.

s/ Joseph H. Reiter
JOSEPH H. REITER
Attorney for Plaintiffs

Of Counsel:
Stassen Kostos and Mason
2300 Two Girard Plaza
Philadelphia, PA 19102

ANSWER TO COMPLAINT

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

CIVIL ACTION NO. 82-3795

EUGENE KISIELOWSKI and UNITED TEREX, INC.

v.

UNITED STATES OF AMERICA WILLIAM HUNT AND GEORGE MERGEL

ANSWER

The United States of America, George Mergel and William Hunt, by their attorneys, Peter F. Vaira, United States Attorney in and for the Eastern District of Pennsylvania and Joseph M. Masiuk, Assistant United States Attorney in and for the same District hereby answer the above-captioned Complaint as follows:

FIRST DEFENSE

1-3. The allegation contained in paragraphs 1-3 are conclusions of law which requires no response. However, to the extent that a response may be deemed necessary, they are denied.

4. Admitted.

5. Admitted that Eugene Kisielowski is President and Chief Operating Officer of UTI. With regard to the remaining allegations of paragraph 5, defendants are without knowledge or information sufficient to form a belief as to their truth, therefore they are denied.

6. Admitted that the United States is a sovereign. The remaining allegations of paragraph 6 are denied.

7. Admitted.

8. Denied that George Mergel was an AVRADCOM contracting officer. The remaining allegations of paragraph 8 are admitted.

9. Defendants adopt and reallege here their response to paragraphs 1-8 of the Complaint.

10-12. Denied.

13. Denied.

(a) Admitted that on or about October 22, 1980, Hunt insisted that UTI reveal its forging supplier. The remaining allegations of subparagraph (a) are denied.

(b) Admitted that Hunt suspended progress payments to UTI. Defendants aver that this suspension occurred on October 31, 1980. The remaining allegations of subparagraph (b) are denied.

(c)-(d) Denied.

(e) Admitted that on or about March 18, 1981, Hunt terminated UTI's contract to manufacture aerial cargo slings citing as justification UTI's failure to deliver a first article test report by February 13, 1981. The remaining allegations of subparagraph (e) are denied.

(f) Denied.

(g) Admitted that information was forwarded to another government agency regarding UTI's purchase of rope from Elisha Webb. Defendants aver that on January 30, 1981, an attorney-advisor with TSARCOM sent a letter to the United States Attorney's office in Philadelphia describing the circumstances then known about the purported purchase of rope from Elisha Webb and recommended that an investigation into possible fraud against the United States be conducted. The remaining allegations of subparagraph (g) are denied.

14. Defendants adopt and reallege here their responses to paragraphs 1-13 of the Complaint.

15. Denied.

16. Defendants adopt and reallege here their responses to paragraphs 1-15 of the Complaint.

17-19. Defendants are without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraphs 17-19 therefore, they are denied.

20. Denied.

21. Defendants adopt and reallege here their responses to paragraphs 1-20 of the Complaint.

22. The allegations contained in paragraph 22 are conclusions of law which require no response. However, to the extent that a response may be deemed necessary they are denied.

Answer to Complaint

23. Defendants adopt and reallege here their responses to paragraphs 1-22 of the Complaint.

24. The allegations contained in paragraph 24 are conclusions of law which requires no response. However, to the extent that a response may be deemed necessary they are denied.

25. Defendants adopt and reallege here their responses to paragraphs 1-24 of the Complaint.

26. The allegations contained in paragraph 26 are conclusions of law which require no response. However, to the extent that a response may be deemed necessary they are denied.

27. Defendants hereby expressly deny all allegations of the Complaint not otherwise hereinbefore.

SECOND DEFENSE

28. This Court lacks jurisdiction over subject matter of this action.

THIRD DEFENSE

29. The Complaint fails to state a claim upon which relief can be granted.

FOURTH DEFENSE

30. Plaintiffs' action is barred by the statute of limitations.

FIFTH DEFENSE

31. This Court lacks jurisdiction over the person of the individually named defendant William Hunt.

Answer to Complaint

SIXTH DEFENSE

32. The individually named defendants are immune from suit.

SEVENTH DEFENSE

33. Service of process on the individually named defendant William Hunt was legally insufficient.

EIGHTH DEFENSE

34. Defendant George Mergel has not been served with process.

NINTH DEFENSE

35. Assuming proper service of process, this Court lacks jurisdiction over the individually named defendant George Mergel.

TENTH DEFENSE

36. Venue of plaintiffs' claim against the individually named defendants does not properly lie in this Court.

WHEREFORE, defendants respectfully request judgment in their favor and against plaintiffs, dismissing the Complaint.

Respectfully submitted,

s/ Peter F. Vaira
PETER F. VAIRA
United States Attorney

JOSEPH M. NASIUK
Assistant United States
Attorney

OF COUNSEL:
MAJOR HOWARD G. CURTIS
Litigation Division
Office of the Judge Advocate General
Department of the Army
Washington, D.C. 20130

DEFENDANTS' MOTION TO DISMISS WITH SUPPORTING PAPERS

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

CIVIL ACTION NO. 82-3795

EUGENE KISIELOWSKI and UNITED TEREX, INC.

Plaintiffs,

v.

UNITED STATES OF AMERICA, WILLIAM HUNT and GEORGE MERGEL,

Defendants.

DEFENDANTS' MOTION TO DISMISS OR, IN THE ALTERNATIVE, FOR SUMMARY JUDGMENT

The United States of America, William Hunt and George Mergel, by their attorneys, Peter F. Vaira, United States Attorney in and for the Eastern District of Pennsylvania, and Joseph M. Masiuk, Assistant United States Attorney in and for the same District, hereby move to dismiss plaintiffs' complaint, pursuant to Rule 12 of the Federal Rules of Civil Procedure, for the reasons that this Court lacks jurisdiction over the subject matter of this action; this Court lacks jurisdiction over the persons of the individually named defendants; venue of plaintiffs' claims against the individually named defendants does not properly lie in this Court; the complaint fails to state a claim upon which relief can be granted; and Count VI of the complaint, for "Injurious Falsehood," is barred by the statute of limitations.

Defendants' Motion to Dismiss with Supporting Papers

In the alternative, defendants move for summary judgment, pursuant to Rule 56 of the Federal Rules of Civil Procedure, for the reasons that there is no genuine issue as to any material fact and that defendants are entitled to judgment in their favor as a matter of law.

In support of this Motion, defendants attach hereto, and incorporate herein by reference, the following:

Declaration of William D. Hunt

Declaration of George R. Mergel

Affidavit of A.F. Liberatore

Affidavit of Story C. Stevens

Affidavit of Booker T. McManus

Defendants' Exhibit 1

Supplemental Declaration of George R. Mergel

Defendants also submit herewith a Brief in support of this Motion, citing relevant points and authorities for the Court's consideration.

WHEREFORE, defendants pray that plaintiffs' complaint be dismissed or, in the alternative, that this Court enter summary judgment in favor of the defendants.

Respectfully submitted,

s/
PETER F. VAIRA
United States Attorney

s/
JOSEPH M. MASIUK
Assistant United States Attorney

OF COUNSEL:

MAJOR HOWARD G. CURTIS
Litigation Division
Office of The Judge Advocate General
Department of the Army
Washington, D.C. 20310

Defendants' Motion to Dismiss with Supporting Papers

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

CIVIL ACTION NO. 82-3795

EUGENE KISIELOWSKI and UNITED TEREX, INC.

v.

UNITED STATES OF AMERICA, WILLIAM HUNT and GEORGE MERGEL

DECLARATION OF WILLIAM D. HUNT

I, WILLIAM D. HUNT, hereby declare that:

1. I am employed as a Contracting Officer for the U.S. Army Aviation Research and Development Command (AVRADCOM), located in St. Louis, Missouri. I have been a Contracting Officer with the Army since 1964, and have worked for the Department of Defense for the past thirty-nine years.

2. I signed contract DAAK50-79-C-0037 on September 28, 1979, awarding to United Terex, Inc. (UTI) a contract to produce 1,445 each 10,000 lb. and 1,675 each 25,000 lb. aerial cargo slings. Its value was $1,488,250. UTI's was the lower of two bids received. Award was made by me as a Contracting Officer pursuant to section 1, Part 402 of the Defense Acquisition Regulation (DAR).

3. UTI was contractually bound to deliver a first article test report on July 13, 1980. I wrote the contractor a reminder to this effect on July 21, 1980. When the report was not forthcoming I issued a show cause letter on August 28, 1980. This was an

invitation to the contractor, under the "Default" clause of the contract, DAR §7-103.11, to explain why the agreement should not be terminated for default. UTI's response, on September 10, 1980, claimed that the delay was excusable because its subcontractor, a British steel-forging house, was shut down due to a British national steel strike. I asked UTI's president, Mr. Kisielowski, for the subcontractor's name so that I could speak to the British supplier, as it was my responsibility as Contracting Officer to verify the accuracy of any claim of excusable delay. Mr. Kisielowski was evasive, and for the next six weeks he continued to be so. I began to wonder if his response was not a dilatory tactic in an attempt to buy some time in delivering finished articles. Since the test report had been delinquent since July 13, and there was no discernable progress under the contract, I exercised a measure available to me and discontinued progress payments to UTI. The authority to do so is contained in the "Progress Payments" clause of the contract, DAR §7-104.35(b). I believed then, as I do now, that I acted reasonably in doing so to protect the best interests of the Government.

4. UTI alleged that the rope testing specification for the sling leg was technically unfeasible and physically impossible to perform because the load ranges could not be applied at the frequency specified. I arranged for an independent test laboratory to perform the test in order to verify that it could be done. The laboratory's report indicated that the rope would respond adequately, but that the rope temperature rise was greater than expected with potential adverse effects on the nylon and polyurethane. Rather than risk deformation of the polyurethane, the specification cyclic requirements were changed to allow cycling at lower ranges periodically for rope cooling purposes. The test duration was unchanged.

5. I have never acknowledged that the rope testing specification was defective. I did prepare a contract modification incorporating the changes to the rope test described in paragraph 4 above. It required both the contractor's and my signature to take effect. Mr. Kisielowski, as the president of UTI, refused to sign it. This proposed modification was not an attempt to compel UTI to give up any and all claims regarding the change, it was an offer which UTI was free to refuse, or to which a counteroffer could have been made. In any event, the proposed modification described above was rejected and never became effective.

6. At the time progress payments were suspended, described in paragraph 3 above, UTI had collected $35,436. The day before that suspension became effective UTI collected one progress payment from the Philadelphia paying office in the amount of $316,306. In my judgment, the size of this payment was highly unusual, and I asked the Administrative Contracting Officer (ACO) located in Philadelphia to supply me with the invoices UTI submitted as justification. After seeing them I was suspicious of one marked "pro forma," and my suspicions were not allayed after conversing with the president of the rope supplier issuing it. Upon investigation, I believed that UTI accepted the progress payment without having acquired title to the goods, which was a violation of the "Progress Payments" clause. As was my responsibility as the Contracting Officer, I subsequently ordered an audit, performed by the Defense Contract Audit Agency, which determined that $249,461 in progress payments was improperly paid to UTI.

7. Mr. Kisielowski demanded and received a meeting with the ACO at the Philadelphia paying office on February 28, 1981. He offered to purchase the remainder of the goods on which the $249,461 overpayment was based to ensure his title, but leave

them at his supplier's plant. I found this unacceptable, and I could not help but question UTI's business ethics. I began to wonder if the contract should be allowed to continue. A second date for delivery of the first article test had passed without its delivery, leading to the question of when, indeed if, performance on the contract would be forthcoming. I therefore told the ACO to hold off on UTI's proposal until I could think the matter through. I did not foreclose UTI's ability to repay to the Government the improper progress payments because that was never offered as an option. Nor were these events a set up for a termination. I was acting solely to protect the business interests of the Government.

8. UTI and the Government had renegotiated the due date of the first article test report to February 13, 1981. Both the rope sling legs and metalware had to be tested, and I agreed with Mr. Kisielowski's request that the tests be run independently of each other. In agreeing to this, however, I did not agree to any further extensions of time. When the test report was received it covered only metalware testing and contained the statement "By contractual redirection, Reference 2, only metal parts of the Sling system had to be tested." (Reference 2 was my letter allowing separate testing). This verbiage indicated to me that UTI denied responsibility to perform the rope test, which I regarded as a remaining contractual obligation. This repudiation of performance, plus the acceptance of a progress payment for which there was no entitlement, convinced me that the Government's best interests would be served by terminating the UTI contract for default.

9. It was my responsibility as the Contracting Officer to investigate UTI's acceptance of the $249,461 progress payment for which no costs were incurred and the apparent lack of title

to the goods held by Elisha Webb, the rope supplier. I concluded that a violation of the False Claims Act may have occurred and took steps open to me to pursue the matter. I formulated no new information, basing my actions on what had already been developed.

10. I terminated contract DAAK50-79-C-0037 on March 18, 1981 pursuant to the "Default" clause of the contract. UTI received telephonic notice of the termination on that date and written notice on March 24. Mr. Kisielowski arranged for a meeting with AVRADCOM's Commander on March 26, the substance of which was that the termination was improper. He also made this case to other AVRADCOM procurement officials. My decision was final, however, for the reasons stated in the foregoing paragraphs, and that was communicated to him.

11. UTI subsequently brought an action in the United States Court of Claims, pursuant to the "Default" clause of the contract and the Contract Disputes Act of 1978, 41 USC §601 *et seq.*, appealing the termination for default. This dispute as to whether the termination for default was proper is presently pending before the United States Claims Court as *United Terex, Inc. v. United States,* No. 353-81C, filed on May 29, 1981.

12. The actions I have taken as Contracting Officer were performed in order to acquire items needed by the Army and at the same time to fully represent and protect the best interests of the Government. In so doing I regard my actions as having been reasonable and within the scope of my official duties. I was motivated only by a concern for protecting the best interests of the United States and not by any personal malice or animus towards UTI or its president, Mr. Kisielowski.

13. I am presently a resident of the State of Missouri, and have been for the past 57 years. To the best of my knowledge I have had no personal contacts with the State of Pennsylvania, having never resided, owned property, or conducted a personal business within that state.

14. With respect to the manner in which I acquired copies of the summons and complaint in this case, on September 22, 1982, an individual identifying himself as federal marshal left those items with my supervisor's secretary at my place of employment at 4300 Goodfellow Boulevard, St. Louis, Missouri. He did not present them to me in person nor did I execute any kind of receipt for them. Additionally, I have never authorized my supervisor's secretary, or anyone else at my place of employment, to act as my agent for the purpose of accepting or receiving legal process.

I further declare under penalty of perjury that the foregoing is true and correct, to the best of my knowledge and belief. Executed this 13 day of December, 1982, in the City of St. Louis, State of Missouri.

s/ William D. Hunt
WILLIAM D. HUNT

Defendants' Motion to Dismiss with Supporting Papers

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

CIVIL ACTION NO. 82-3795

EUGENE KISIELOWSKI and UNITED TEREX, INC.

V.

UNITED STATES OF AMERICA, WILLIAM HUNT and GEORGE MERGEL

DECLARATION OF GEORGE R. MERGEL

I, GEORGE R. MERGEL, hereby declare that:

1. I was formerly employed as a Contracting Officer with the United States Army Troop Support and Aviation Materiel Readiness Command (TSARCOM), located in St. Louis, Missouri. I served in that capacity for one year. Prior to that I worked for the Department of the Army as a contract administrator, contract negotiator and contract specialist for seventeen years.

2. After contract DAAK50-79C-0037, between the United States Army Aviation Research and Development Command (AVRADCOM) and United Terex, Inc. (UTI), was terminated for default, I was designated the Contracting Officer in charge of efforts to reprocure the 1,445 - 10,000 lb. and the 1,675 - 25,000 lb. aerial cargo slings which UTI was to have provided under the AVRADCOM contract. An invitation for bids was issued and UTI's was the lowest of eight bids received.

3. Although I had no direct or indirect involvement in any decision-making regarding the AVRADCOM contract with UTI, I became aware of the events surrounding the progress payment issue on the defaulted contract subsequent to UTI having been declared in default. I learned that UTI had applied for and accepted a progress payment of $249,461 and that an audit showed no costs had been incurred for the amount. At this time the Army had asked UTI for an accounting of the inventory it held under the defaulted contract but had received no reply. There had been no reply to the demand that UTI repay the amount of Government payments it held for which the audit showed no costs had been incurred.

4. As a Contracting Officer, I was charged by section 1-904.1 of the Defense Acquisition Regulation (DAR) to make an affirmative determination of a prospective contactor's responsibility before award of a contract could be made. One element of that responsibility determination related to integrity. From what I knew of events pertaining to the AVRADCOM contract, I had sufficient doubts about UTI's integrity that I could not in good conscience find UTI to be a responsible contractor.

5. However, I did not have final decision-making authority on such matters since UTI was a small business. Pursuant to 15 U.S.C. § 637(b)(1)(B)(7)(A) and DAR § 1-705.4 (a), the Small Business Administration (SBA) has statutory authority to certify the competency of any small business concern as to all elements of responsibility, including integrity. According to DAR, I was required to forward the question of UTI's responsibility to the SBA for their decision whether to issue a Certificate of Competency or not, and further, I was bound by that SBA decision.

6. The SBA declined to issue a Certificate of Competency regarding UTI. Its decision did state that UTI had sufficient capacity, but that was not the issue for decision. To my knowledge, neither the SBA nor any other Government agency has ever made affirmative recognition of UTI's integrity.

7. I made the decision to forward the question of UTI's responsibility to the SBA based on facts and circumstances which I examined objectively. In reaching my decision, I was motivated only by my clear responsibility to protect the best interests of the United States and the intergrity of the Army's procurement process through scrupulous adherence to the applicable statutes and agency regulations and the exercise of sound business judgment within the bounds of the discretion afforded me as an Army Contracting Officer.

8. I have no futher knowledge regarding the processing of the TSARCOM reprocurement solicitation inasmuch as I retired from Government service on February 4, 1982, before final action to award a contract under the solicitation, whether to UTI or any other bidder, could be consummated.

9. I am a citizen of the State of Missouri, presently residing in the St. Louis metropolitan area. Other than for a brief period while serving on active duty in the Armed Forces of the United States, I have been a resident of Missouri for the last 65 years. Additionally, to the best of my knowledge, I have had no personal contact with the State of Pennsylvania, having never resided, owned property, or conducted a personal business within the state.

10. Although I am familiar with plaintiff's allegations in this lawsuit, having been advised of them by Government counsel, I have never received service of the summons and complaint.

Defendants' Motion to Dismiss with Supporting Papers

I further declare under penalty of perjury that the foregoing is true and correct, to the best of my knowledge and belief. Executed the 13 day of December, 1982, in the City of St. Louis, State of Missouri.

s/ George R. Mergel
GEORGE R. MERGEL

Defendants' Motion to Dismiss with Supporting Papers

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

CIVIL ACTION NO. 82-3795

EUGENE KISIELOWSKI and UNITED TEREX, INC.,

Plaintiffs

v.

UNITED STATES OF AMERICA, WILLIAM HUNT and GEORGE MERGEL,

Defendants

AFFIDAVIT OF A.F. LIBERATORE

I, A.F. LIBERATORE, having been first duly sworn, hereby depose and say:

1. I am the Chief of the Invitation for Bids Branch, Directorate for Procurement and Production, U.S. Army Troop Support and Aviation Materiel Readiness Command (TSARCOM), 4300 Goodfellow Blvd., St. Louis, Missouri 63120. I supervise approximately 35 buyers who purchase air delivery and recovery systems equipment for the Army, which includes the U.S. Army Aviation Research and Development Command (AVRADCOM) as well as TSARCOM. To the best of my knowledge, all of this type of equipment bought by the Army is bought by my branch.

2. From November, 1980 to the present, the following contracts for the manufacture of air delivery and recovery systems

equipment have been awarded to defendant United Terex, Inc. (UTI) by my branch:

CONTRACT NUMBER	DATE OF AWARD	NOMENCLATURE	QTY	AMOUNT
DAAJO9-81-C-0169	14 Nov 80	Aerial Recovery Kit	45 ea	$577,600.00
DAAJO9-81-C-0560	25 Feb 81	Actuator, Platform, Extraction	40	11,386.00
DAAJO9-81-C-0900	12 May 81	Release, Cargo Parachute, M-1	807	442,397.40
DAAJO9-82-C-A043	30 Oct 81	Timer Delay Assy	810	74,682.00
DAAJO9-82-C-A892	9 Mar 82	Housing Assy	711	54,569.25
DAAJ09-82-C-A901	10 Mar 82	Coupling, Airdrop	314	199,704.00
DAAJO9-82-C-B036	6 Apr 82	Release, Cargo Parachute, M-2	61	118,584.00
DAAJO9-82-C-B214	14 Jun 82	Aerial Recovery Kit	3	59,512.50
DAAJO9-82-C-D044	30 Aug 82	Sling Cargo	700	314,307.00

3. I know that an earlier UTI contract for this type of item was terminated for default, and that UTI alleges a *de facto* debarment precluding awards of this type of equipment to the firm. I have personal knowledge of the fact that these awards were made. I deny there has been a *de facto* debarment of UTI regarding the manufacture of air delivery and recovery systems equipment as evidenced by the foregoing contract awards to UTI.

s/ A.F. Liberatore
A.F. LIBERATORE

Defendants' Motion to Dismiss with Supporting Papers

STATE OF MISSOURI)
)
CITY OF ST. LOUIS)

Subscribed and sworn to before me this 1st day of November, 1982.

s/ Shirley M. Davis
NOTARY PUBLIC

My commission expires: Apr. 4, 1985

Defendants' Motion to Dismiss with Supporting Papers

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

CIVIL ACTION NO. 82-3795

EUGENE KISIELOWSKI and UNITED TEREX, INC.,

Plaintiffs

v.

UNITED STATES OF AMERICA, WILLIAM HUNT and GEORGE MERGEL,

Defendants

AFFIDAVIT OF STORY C. STEVENS

I, STORY C. STEVENS, having been first duly sworn, hereby depose and say:

1. I am a Major General in the United States Army and am the Commander of the Army Aviation Research and Development Command (AVRADCOM), 4300 Goodfellow Blvd., St. Louis, Missouri 63120. I have commanded AVRADCOM since its formation in 1977.

2. I am personally familiar with the events leading up to the termination for default of AVRADCOM's contract for cargo slings with United Terex, Inc. I reviewed the administrative record immediately after the termination at Mr. Kisielowski's request.

3. The Defense Acquisition Regulation affords broad discretion to an authorized Contracting Officer in making business judgments. I am familiar with the actions William Hunt took as Contracting Officer during this period. Having reviewed the allegations of impropriety leveled at Mr. Hunt, I am satisfied that his actions were not motivated by malice or ill will. As his Commanding Officer it is my judgment that he acted within his authority as Contracting Officer, and in so doing acted in the best interests of the United States.

s/ Story C. Stevens
STORY C. STEVENS

STATE OF MISSOURI

CITY OF ST. LOUIS

Subscribed and sworn to before me this 23rd day of November, 1982.

s/ illegible
NOTARY PUBLIC

My commission expires: 16 Oct. 1983

Defendants' Motion to Dismiss with Supporting Papers

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

CIVIL ACTION NO. 82-3795

EUGENE KISIELOWSKI and UNITED TEREX, INC.,

Plaintiffs

v.

UNITED STATES OF AMERICA, WILLIAM HUNT and GEORGE MERGEL,

Defendants

AFFIDAVIT OF BOOKER T. McMANUS

I, BOOKER T. McMANUS, having been first duly sworn, hereby depose and say:

1. I am a Colonel in the United States Army. My current assignment is the position of Chief of Staff of the Army Troop Support and Aviation Materiel Readiness Command (TSARCOM), 4300 Goodfellow Blvd., St. Louis, Missouri 63120, which I have occupied since October, 1979.

2. Previously I had been the Deputy Director for Procurement and Production at TSARCOM from February, 1978 until October, 1979. In the course of performing those duties, I became familiar with the responsibilities of a Contracting Officer for the U.S. Government. One holding that position is authorized by the Defense Acquisition Regulation (DAR) to speak for the

Government and within this authority has wide discretion and latitude in making business judgments.

3. George Mergel was the Contracting Officer under whose authority the solicitation for the manufacture of cargo slings was issued in 1981. United Terex, Inc. offered the lowest bid for the work. DAR required all proposed contractors to be responsible, meaning that they have adequate financial resources, be able to comply with required delivery schedules, have a satisfactory record of performance, and have a satisfactory record of integrity. Mr. Mergel was unable to find that United Terex, Inc. fulfilled the latter factor, and on December 8, 1981 issued a nonresponsibility determination based on a lack of integrity which removed United Terex, Inc.'s bid from the competition. As required by DAR, the nonresponsibility determination was forwarded to the Small Business Administration for their final decision on responsibility. That agency upheld Mr. Mergel's determination.

4. I have reviewed the administrative record with regard to Mr. Mergel's actions in this case. In my professional judgment as TSARCOM Chief of Staff I am satisfied that the actions he took were within the bounds of his discretion and authority as a Contracting Officer, and that he acted properly, within the scope of his employment, and in the best interests of the United States.

s/ Booker T. McManus
BOOKER T. McMANUS

Defendants' Motion to Dismiss with Supporting Papers

STATE OF MISSOURI

CITY OF ST. LOUIS

Subscribed and sworn to before me this 23rd day of November, 1982.

s/ Shirley A. Kinon
NOTARY PUBLIC

My commission expires:
Shirley A. Kinon
Notary Public, State of Missouri
My Commission expires Sept. 17, 1983
St. Louis County

Defendants' Motion to Dismiss with Supporting Papers

IN THE UNITED STATES COURT OF CLAIMS

353-81 C

United Terex, Inc.

Plaintiff

v.

United States of America

Defendant

PETITION FILED MAY 29, 1981

To the Honorable, the Judges of the Court of Claims, United Terex, Inc. respectfully avers and alleges as follows:

1. The Plaintiff is an experienced manufacturer on Government contracts of such items as airdrop platforms, tool repair cabinets, as well as air delivery and recovery systems.

2. The Plaintiff's President and Chief Operating Officer is a graduate engineer with degrees in both mechanical and aeronautical engineering.

3. The Plaintiff and its predecessors have, since 1971, successfully performed on over 60 Government contracts with such Government agencies as NASA, the U.S. Navy, as well as the U.S. Army Aviation Research and Development Command (AVRADCOM) and the U.S. Army Troop Support and Aviation Research Command (TSARCOM).

4. Neither the Plaintiff nor its predecessors have ever been terminated for default except under the instant contract which was terminated for default on 18 March 1981.

5. The Plaintiff seeks to have this termination for default converted to a termination for convenience. This Court's jurisdiction to grant the relief requested is based upon Section 10 of the Contract Disputes Act, 92 Stat. 2328, 41 USC Section 609 (1978). Plaintiff brings the instant action within 12 months of the Contracting Officer's final decision. This action is therefore timely.

6. The instant contract, which contains the standard changes and default articles, was awarded to the Plaintiff on 28 September 1979 by the U.S. Army Research and Development Command (AVRADCOM). The contract called for the manufacture and delivery of 3,120 each sling, aerial cargo.

7. 1,445 of the aerial slings were to have 10,000 pound capacity (10 k) while 1,675 of the aerial slings were to have a 25,000 pound capacity (25 k). The unit price for the 10 k sling was $375, the unit price for the 25 k sling was $565. The total contract price was $1,488,250.

8. The sling assembly consisted essentially of rope and hardware designed to hold cargo for pick-up and transport by helicopter.

FIRST ARTICLE TEST

9. Under the terms of the contract, as amended, the Plaintiff was required to deliver a satisfactory first article test report by 13 February 1981.

10. One of the tests (a strength and endurance type test) required by the contract for inclusion in the first article test report was a cyclical load test pursuant to Paragraph 4.5.7 of MIL S DRAV EXH 79-1 on one, each, rope assembly from both the 10 k sling and the 25 k sling.

11. The cyclical load test consisted of a mechanical jerking of the rope assembly at a certain frequency (4 Hz) and under certain applied load ranges (4,000 ± 2,000 lb for the 10 k sling and 8,000 ± 4,000 lb. for the 25 k sling). The test was to continue for 20 hours.

12. Because of the rope's inherent inability to retract quickly enough from the extension caused by the jerks, the procedure, as outlined in Paragraph 4.5.7 of MIL-S-DRDAV-EXH-79-1, was incapable of testing the strength/endurance of the rope.

13. The Plaintiff alerted the Defendant through its Contracting Officer, William B. Hunt ("Hunt") to this defective testing procedure on 1 July 1980 and again by letter dated 4 December 1980, supplying supporting documentation from an independent source. Also on 4 December 1980, Plaintiff requested permission from Hunt to test hardware alone, pending correction of the technical inadequacies of the specification rope test.

14. In response, Hunt, by letter dated 12 December 1980, granted Plaintiff permission "to perform first article tests on the hardware independent of the sling legs" i.e. the rope assembly. He did not then, or at any other time, respond to Plaintiff's technical findings vis-a-vis the rope test.

15. By letter dated 13 January 1981, Hunt submitted to the Plaintiff a supplemental agreement (Mod P00004) for signature,

which supplemental agreement, if signed by Plaintiff would have revised the rope assembly test procedure at no cost to the Government by requiring the cycling (jerking) to be at the same frequency of 4 Hz and at the same load ranges for part of the time and by also permitting a lower frequency (2.5 Hz) and different load ranges for the balance of the 20 hours.

16. The revised test was still not feasible for the same reasons as the intitial test, and the Plaintiff refused to sign the supplemental agreement.

17. The Plaintiff did however request that if the Defendant persisted in its position that the revised testing procedure was feasible, the Government should impose that test through a unilateral change order which would not require Plaintiff's concurrence.

18. By letter dated 9 February 1981, the Defendant, *subsilento*, claimed its revised test was feasible, but failed then, or at any other time, to direct Plaintiff, as required by the Changes Article, to perform the revised test. Plaintiff requested Hunt to supply the supporting test data on which his claim was based, but he failed to supply it.

19. The first article test on the hardware was performed before representatives of Defendant on 27 January 1981. On 10 February 1981, three days before the first article test submission date (13 February 1981) Plaintiff by letter submitted its first article test report which included tests of the hardware only. In that letter, Plaintiff recommended that "approval be granted. . .for all metal components which met. . .design loads and functional requirements" and requested "approval be granted to commit these parts into immediate production." Plaintiff's test report

was reviewed by a representative of the Defendant on 11 February 1981.

20. In that same letter, i.e. the letter of 10 February 1981, the Plaintiff also informed the Defendant that Government design for the 10 k grab hook was defective.

21. By letter dated 13 February 1981, the first article submission date, the Defendant granted Plaintiff's request of 10 February 1981 and instructed Plaintiff "to proceed with the production of all metalware applicable to this contract except the 10 k grab hook".

22. Pursuant to this instruction Plaintiff commenced and continued production on all metalware except the 10 k grab hook.

23. At a 20 February 1981 meeting with Defendant, Plaintiff again requested that an order be issued pursuant to the Changes Article directing it to apply the revised testing procedure to the rope assembly.

24. At the same meeting, 20 February 1981, the Defendant provided Plaintiff with a contract modification correcting the Government's defective design of the 10 k grab hook but did not pursuant to the changes article direct Plaintiff to apply the revised testing procedure to the rope assembly.

25. Pursuant to the modification correcting the design of the 10 k grab hook, Plaintiff started to fabricate the grab hook as corrected.

26. On 18 March 1981, Plaintiff called the Defendant to inform Defendant that the 10 k grab hook which had been

modified in design to correct the original deficiency would be ready for a first article testing by April 6 or 7 and again requested an order issued pursuant to the Changes Article directing Plaintiff to apply the revised testing procedure to the rope assembly.

27. During that telephone conversation the Defendant informed the Plaintiff that Plaintiff's contract was being terminated for default. By a letter dated 18 March 1981, the Plaintiff was terminated for default. The letter stated among other things the following:

> "the basis for this termination is your failure to deliver a first article test report for the rope portion of the contract when it was due on 13 February 1981, thus jeopardizing the production of slings due for delivery 30 April 1981."

28. The termination for default for failure to deliver a first article test report for the rope portion of the contract by 13 February 1981 was invalid in that:

a. the initial test procedure was incapable of testing the properties (strength/endurance) sought to be tested;

b. the revised test procedure was incapable of testing the properties (strength/endurance) sought to be tested;

c. the revised test procedure was never incorporated into the contract; and

d. even if incorporated into the contract, the Defendant by its actions coupled with Plaintiff's reliance on Defendant's actions had by 18 March 1981, the date of the termination, waived the

13 February 1981 1st article test date and failed to re-establish a new and reasonable date.

e. redesign by the Government of its defect design for the 10 k grab hook had already rendered the delivery date impossible.

PROGRESS PAYMENTS

29. The contract also provided for advance payments (progress payments) for up to 85 percent of the contractor's total costs.

30. The Plaintiff requested and received a series of progress payments under the contract including progress payment No. 5.

31. The 5th progress payment received by the Plaintiff on November 1980 was for $312,262.00 and was based on Plaintiff's contract with Elisha Webb and Son, Company for all of the rope requirements under the instant contract.

32. The Plaintiff and Elisha Webb and Son, Company interpreted the contract between them as having passed title to all of the rope required under the instant contract to Plaintiff.

33. The Government after audit interpreted the agreement between Plaintiff and Elisha Webb and Son, Company as not having passed title to all of the rope required under the instant contract and claimed the request for progress payment No. 5 and its payment had therefore been premature.

34. As a result, all then pending progress payment requests (Nos. 10, 11, and 12) were held in abeyance by the Government pending a resolution of the title passing issue.

Defendants' Motion to Dismiss with Supporting Papers

35. The issue was resolved at a meeting between the Plaintiff and the Defendant on 27 February 1981, wherein the Plaintiff agreed to supply the Defendant with a document of title, i.e., a Uniform Commercial Code No. 1 Financing Statement within 30 days, and the Defendant through its Administrative Contracting Officer agreed, upon receipt of such evidence of title, to honor the pending progress payment, Nos. 10, 11 and 12.

36. This agreement between the Plaintiff and the Defendant was immediately confirmed by letter from the Plaintiff dated 27 February 1981, the same day that the agreement was reached.

37. No exception to Plaintiff's letter confirming the agreement reached between it and the Defendant on 27 February 1981 was ever taken by the Defendant.

38. Plaintiff did in fact, prior to the expiration of 30 days, procure from his supplier a Uniform Commercial Code No. 1 Financing Statement.

39. The 18 March 1981 Notice of Termination set forth as an alternate basis for the default termination the following:

> "Your violation of the progress payment clause amounts to the breach of a material provision of the contract. The Government rests this termination for default on this breach as well as your failure to deliver first article report on the rope when it was due."

40. The termination for default for violation on the progress payment clause was invalid in that:

Defendants' Motion to Dismiss with Supporting Papers

a. The Plaintiff did not violate the progress payment clause;

b. Even if Plaintiff had violated the progress payment clause, that was not a material breach which would work a forfeiture under the Default Article; and

c. Even if it were a material breach, the Defendant had waived its right to terminate for default for that breach by its subsequent actions upon which the Plaintiff relied.

Wherefore, Plaintiff requests its petition be granted, that Plaintiff be granted such other relief as the nature of the case may require and the Court deem just and equitable, and that the matter be remanded to the procuring agency for establishment of quantum.

Respectfully submitted,

s/ Theodore M. Kostos
THEODORE M. KOSTOS

of counsel:
Stassen Kostos and Mason

Defendants' Motion to Dismiss with Supporting Papers

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

CIVIL ACTION NO. 82-3795

EUGENE KISIELOWSKI and UNITED TEREX, INC.

Plaintiffs,

v.

UNITED STATES OF AMERICA, WILLIAM HUNT and GEORGE MERGEL,

Defendants.

SUPPLEMENTAL DECLARATION OF GEORGE R. MERGEL

I, George R. Mergel, hereby declare that:

1. I am one of the named defendants in the instant lawsuit. The purpose of this declaration is to supplement my earlier declaration of December 13, 1982.

2. Although I continue to reside in the St. Louis, Missouri, metropolitan area, having not changed my place of residence since this lawsuit was filed in late August 1982, to date I have not received service of a summons or complaint.

I further declare under penalty of perjury that the foregoing is true and correct, to the best of my knowledge and belief.

Executed this 11 day of February, 1983, in the City of St. Louis, State of Missouri.

s/ George R. Mergel
GEORGE R. MERGEL

AFFIDAVIT OF EUGENE KISIELOWSKI WITH EXHIBITS

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

No. 82-3795

EUGENE KISIELOWSKI and UNITED TEREX, INC.,

Plaintiffs,

vs.

UNITED STATES OF AMERICA, WILLIAM HUNT and GEORGE MERGEL,

Defendants.

AFFIDAVIT OF EUGENE KISIELOWSKI

COMMONWEALTH OF PENNSYLVANIA

COUNTY OF PHILADELPHIA

EUGENE KISIELOWSKI, being duly sworn according to law, deposes and says as follows:

1. I am the President and sole shareholder of United Terex, Inc. ("UTI").

2. The law firm of Stassen Kostos and Mason has represented me and UTI continuously since 1978.

3. Attorneys from that firm have appeared with me in St. Lous before AVRADCOM and TSARCOM as my attorneys and are known to the defendants as my attorneys.

4. At those meetings, as is the policy of the agency, slips were signed identifying my attorneys as representing me.

5. Further, the law firm is the attorney of record as representing UTI in *UTI v. The United States* in the Claims Court. That suit involves a contract awarded by the agency with which the individual defendants are connected.

6. The United States had full knowledge of my relationship with the law firm of Stassen Kostos and Mason at the time that the United States wrote its letter denying my Federal Tort Claim. That letter is dated March 1, 1982. On September 8, 1981, the United States formally answered my complaint in the U.S. Court of Claims which complaint had as my attorneys of record the law firm of Stassen Kostos and Mason.

7. I have read the instant complaint and authorized my attorneys to file it because my Constitutional rights were invaded by the United States and the individual defendants.

8. As background and setting to the tortious conduct complained of, I point out that UTI is an experienced manufacturer on government contracts including such items as air drop platforms, tool repair cabinets, and air delivery and recovery systems.

9. That I am a graduate engineer with degrees in both mechanical and aeronautical engineering.

10. UTI and its predecessors have been in business since 1971 and successfully performed more than 60 contracts with such Government agencies as NASA, the Navy and the U.S. Army Aviation Research and Development Command

("AVRADCOM") and the U.S. Army Troop Support and Aviation Research Command ("TSARCOM").

11. Prior to 1981, neither UTI nor its predecessor companies had ever been terminated for default on any contract.

12. Contract DAAK50-79-C-0037 was awarded to UTI on September 28, 1979.

13. The contract was for the manufacture of 1,445 each 10,000 lb. and 1,675 each 25,000 lb. aerial cargo slings.

14. The slings are used to lift loads of under cargo/utility helicopters.

15. The contract value was $1,488,240.00.

16. The contracting officer on contract 0037 was William D. Hunt of AVRADCOM.

17. Hunt tried to label UTI as non-responsible in order to deny it a contract award, but his ruling was overruled by the Small Business Administration and UTI was awarded the contract.

18. Because UTI's responsibility had been attested to by the government repeatedly through prior awards, I became suspicious that Hunt wished, for impermissible reasons, to give the contract to Presco International Inc. ("Presco").

19. Thereafter, throughout the life of the contract, Hunt was intent on finding any reason he could to terminate this contract for default, justify his original attempt to label UTI non-responsible and satisfy his desire to give the contract to Presco.

Affidavit of Eugene Kisielowski with Exhibits

20. In late 1979 and early 1980 the British steel industry was struck nationwide. News of the British steel strike was widely published in the U.S. and abroad.

21. As a result, UTI's fabricator of forged items was unable to supply the necessary samples in time for the required first article.

22. The first article test report was originally due on July 13, 1980, but due to the British steel strike the components were not ready in time for testing.

23. It was explained to the contracting officer that the delay was caused by the British steel strike, and a TWX to that effect dated September 10, 1980 was sent to Mr. Hunt by my attorneys Stassen Kostos and Mason. (a copy of TWX is attached hereto as Exhibit "A".)

24. Mr. Hunt inexplicably, despite the worldwide publicity of the strike and my explanation, refused to believe that the delay was excusable and requested additional information regarding the strike including copies of UTI's purchase orders.

25. On August 28, 1980, Mr. Hunt had issued a "show cause letter" threatening to terminate the contract for default; he thereafter demanded the additional information with reference to "the default clause" by TWX dated September 13, 1980. (Copy of the TWX is attached hereto as Exhibit "B".)

26. By letter dated September 22, 1980, UTI furnished the backup documents in support of its request for excusable delay. However, the names of the sources in Britain were deleted as proprietary. Sources of supply within the industry are considered confidential. (A copy of the letter is attached hereto as Exhibit "C".)

27. Mr. Hunt was not satisfied with the response and demanded to know the names of UTI's British sources.

28. UTI offered to supply the requested names, providing Mr. Hunt would guarantee the Government's keeping them confidential, but Mr. Hunt rejected this request. (Copies of correspondence are attached hereto as Exhibit "D".)

29. Thereafter, on October 31, 1980, Mr. Hunt, despite my agreement to disclose to him the requested names, suspended progress payments to UTI, thereby jeopardizing contract performance and making me sorry that I had raised the legitimate issue of confidentiality.

30. Because of this, we were forced to supply the names without any guarantee of confidentiality. (A copy of the TWX is attached hereto as Exhibit "E".)

31. Finally, on November 3, 1980, Mr. Hunt approved UTI's request for excusable delay but only after having gotten the names of our confidential sources of supply.

32. The next example of Mr. Hunt's obvious intention to terminate this contract for default and control my right to speak out, came in connection with the first article test requirement for a cyclic rope test.

33. Part of the first article test for the rope components was a cyclic test.

34. In that test, the rope was to be cycled at a speed of 4 Hz. (4 cycles per second) with weight at each end.

Affidavit of Eugene Kisielowski with Exhibits

35. In May of 1980, UTI performed cyclic testing at Wyle Labs in Huntsville, Alabama.

36. Present at that testing was Lamoine Plog of AVRADCOM, who has suggested to me that Wyle Labs could perform required testing.

37. Plog was there as the official Government witness to what was to be UTI's first article test for the rope.

38. When we arrived at Wyle Labs, the equipment did not exist to perform the test as specified.

39. The equipment, which was designed for the purpose of this test, would cycle at 4 Hz. with reduced load ranges or at specified load ranges but at a lower cycle, but could not meet both requirements simultaneously.

40. Plog suggested that we test at the 4 Hz. cycle with reduced load range and that he would recommend to his superiors it be acceptable as UTI's first article rope test.

41. In July of 1980, in a meeting at AVRADCOM, Hunt told me that the test UTI had performed was unacceptable as a first article test.

42. The testing which UTI performed produced evidence which showed that the natural frequency of the rope was less than the 4 Hz. specified in the contract.

43. Therefore, when the rope was cycled at 4 Hz. it did not feel the weight (respond).

44. I reported all this to the contracting officer at a July meeting, and in December UTI formally challenged the contractuall specified cyclic rope test as being unfeasible in that it did not actually test the rope. (A copy of the letter is attached hereto as Exhibit "F".)

45. At a meeting in December at AVRADCOM, I suggested to Mr. Hunt that UTI go ahead and perform testing on metal components and set aside the rope test until the technical questions were resolved.

46. By letter, Mr. Hunt consented to my request. (A copy of the letter is attached hereto as Exhibit "G".)

47. Thereafter, Mr. Hunt commissioned Wyle Labs to do a test for the Government.

48. That test supported my contention and produced results that showed that the test could not be accomplished without unreasonably high temperatures to the rope which would ultimately result in damage to it. (A copy of trip report of L. Plog is attached hereto as Exhibit "H".)

49. As a result of the Government's testing, the cyclic rope test was modified and a proposed bilateral modification incorporating the new test was sent to UTI in January of 1981. (A copy of Proposed Modification is attached hereto as Exhibit "I".)

50. I reviewed that revised test with other UTI personnel and we concluded that the Government's modification did not remedy the basic problem we had found in the original test specification.

Affidavit of Eugene Kisielowski with Exhibits

51. We communicated that fact to the contracting officer and requested the supporting data for his conclusion that the new test was feasible. He never supplied the requested documentation.

52. I reiterated to the contracting officer several times that UTI disagreed with the new test, and would perform the test if the Government would incorporate it by way of a unilateral modification, which would not require UTI's agreement as to the test's technical feasibility, while at the same time preserving UTI's due process right to file a claim for any additional costs associated with the revised test procedure.

53. Mr. Hunt never issued the requested unilateral modification, nor did he ever tell us whether he wanted us to do the original test which we had challenged.

54. During the period January 27-28, 1981, UTI performed first article testing on all the metal component parts in accordance with our prior request which the contracting officer approved.

55. In that testing we discovered a Government design deficiency in the grab hook for the 10,000 lb. sling.

56. On February 11, 1981, two days before the new deadline, we submitted a first article test report on the metal parts, alerting the Government to the design deficiency. (A copy of the letter is attached hereto as Exhibit "J".)

57. Thereafter, at a meeting held at AVRADCOM on February 20, 1981, the contracting officer questioned when we intended to do the first article tests on the rope.

Affidavit of Eugene Kisielowski with Exhibits

58. At that time I again reiterated UTI's position that we would perform the test as soon as he issued a unilateral direction incorporating the revised tests, thus preserving my due process rights. We again request the supporting documentation on the government test.

59. At the meeting, Mr. Hunt gave us the written authorization to proceed with manufacture of all metal parts, and a redesign for the 10,000 lb. grab hook with direction to produce a new first article for that component. (Copy of directives attached hereto as Exhibit "K".)

60. At the February 20, 1981 meeting, Mr. Hunt had waived the due date for the tests for tne rope since he gave us directive to commence production on metal parts and the change in design for the 10,000 lb. grab hook.

61. Later, (in March, 1982), I discovered that Mr. Hunt falsely claimed that he never gave UTI permission to delay the rope test pending resolution of the technical dispute, but only permission to test the rope apart from the metal. (Copy of termination letter attached as Exhibit "L".)

62. Under the contract I did not need Mr. Hunt's permission to test the rope "apart" from the metal, a fact that Mr. Hunt acknowledged in a deposition. (A copy of the testimony is attached hereto as Exhibit "M".)

63. Later I also discovered that Mr. Hunt falsely caused a record to be created alleging that UTI's test report on the metal components was received late. The falsity of this demonstrated by our receipt showing delivery one day early. (A copy of the receipt is attached hereto as Exhibit "N".)

Affidavit of Eugene Kisielowski with Exhibits

64. In response to Mr. Hunt's directive to commence production, UTI did commence production on the metal parts.

65. We were in production for approximately a month when I talked with Mr. Hunt on March 18, 1981, at which time he told me he was terminating the contract for default for our failure to submit a first article test report on the rope by the February 13, 1981 due date.

66. Thereafter, UTI received a TWX and confirming letter terminating the contract for default for that reason along with an alleged violation of the progress payment clause. (Exhibit "L").

67. The matter of the progress payment was but another example of Mr. Hunt's striving to terminate the contract for default and injure my reputation.

68. A major component for the end item was rope for the sling legs.

69. UTI contracted with Elisha Webb & Co. ("Webb") to supply the necessary rope. (A copy of the contract is attached hereto as Exhibit "O".)

70. Webb issued an invoice to UTI for full payment on the rope which UTI submitted to the Administrative Contracting Officer in a progress payment request. (A copy of the request and invoice is attached hereto as Exhibit "P".)

71. It was my understanding that UTI was entitled to a progress payment on the Webb invoice under the regulations for small business since we had incurred the full cost of the rope.

72. After we received the payment, UTI tendered it to Webb since it did not have the space for all the rope, Webb elected to be paid on a COD basis. (A copy of the Affidavit of Ray Lodise of Elisha Webb is attached hereto as Exhibit "Q".)

73. I later learned (in March 1982), through FOIA requests, that Mr. Hunt contacted Webb in an effort to falsely generate evidence that the progress payment to UTI was fraudulent (Affidavit of Ray Lodise).

74. Mr. Hunt later caused an audit to be performed at which time the auditor decided that UTI had been "overpaid" because all the rope was not yet in UTI's possession.

75. Representatives of UTI met with Mr. Slade, the Administrative Contracting Officer, on February 27, 1981, in an effort to resolve the dispute.

76. We proposed to Mr. Slade that UTI would supply the Government with documents of title for all the rope, or, if the documents of title were unacceptable to him, UTI would repay the money; we promised to supply the documentation within 30 days.

77. UTI received no response to its proposals and never received any request to repay the money, prior to the termination.

78. I later learned that Mr. Hunt, to the detriment of the U.S., had directed Mr. Slade to take no action on the proposal (see copy of portion of investigative report attached as Exhibit "R").

79. On March 18, before the 30 days expired, Mr. Hunt obviously prevented Mr. Slade from responding so as to create

an alternate ground to support a termination, because Mr. Hunt's termination TWX (dated March 18, before the 30 days expired), cited the alleged breach of the progress payment clause.

80. Mr. Hunt's motive for wanting to punish me, injure my reputation and keep me from litigating in derogation of my Constitutional rights goes beyond simply wanting to justify his original erroneous rejection of UTI.

81. Mr. Hunt is and has been partial to a competitor of UTI for sling contracts, Presco International Corp. ("Presco").

82. As evidence of Mr. Hunt's partiality, UTI has discovered the following:

a) Presco failed first article testing, yet Mr. Hunt did not terminate for default.

b) Presco informed Mr. Hunt that it could not meet its contractually mandated delivery schedule and could not forecast when it would be able to deliver, yet Hunt did not terminate Presco for default. In fact, he did not even issue a "show cause" letter. (A copy of the letter is attached hereto as Exhibit "S".)

c) Mr. Hunt had extended Presco's delivery schedule when it was late, with no consideration to the Government; when questioned on a deposition, he explained that Presco had volunteered to retrieve and repair or replace defective sling assemblies which it had previously shipped to the Government (which repair it was contractually required to do) and he considered that to be consideration for the extensions.

d) Mr. Hunt and others willfully created a document which falsely stated that Presco had successfully performed the

rope test which UTI had said was technically unfeasible. (Copy of letter of April 2, 1981 is attached as Exhibit "T".)

83. In further support of this impermissible prejudice against UTI and impermissible favoritism shown to Presco is the agency's mishandling of UTI's low bid under IFB DAAJO9-82-B-BO33.

84. UTI's bid under that procurement was low and was timely sent via TWX. The records of Western Union indicate that the bid was electronically transmitted to the Agency forty-seven minutes before the bid opening.

85. It was only through government mishandling that the bid, although instantaneously wired to the Agency forty-seven minutes early, did not make it to the bid opening room by bid opening time.

86. The next low bid was submitted by Presco, and it was awarded a contract, after UTI's bid was wrongfully rejected as late.

87. We learned of the false information about my and UTI's integrity being disseminated by Government officials, in connection with the reprocurement of the terminated slings.

88. George Mergel was the contracting officer on the reprocurement for which bids were opened in September 1981.

89. UTI submitted the low bid and a contract based on that bid would have resulted in a lower price to the Government and quicker deliveries.

90. Despite the fact that other agencies and contracting officers were satisfied with UTI's integrity and had found UTI

responsible, Mergel refused to consider its bid, citing a lack of integrity.

91. In his referral to SBA-Philadelphia for possible issuance of a certificate of competency, Mergel cited an alleged lack of integrity on the part of UTI.

92. He provided false information to SBA, to wit, asserting to SBA that UTI had taken a progress payment for the rope when it had never ordered anything, a bold-faced lie. (Documentation attached hereto as Exhibit "U") (Cf. affidavit of Lodise).

93. In January, 1982, SBA, acting on the false information provided it by Mergel, declined to issue the COC.

94. In March of 1982, after the documents were provided to us, I learned of the falsehoods given to SBA and I also learned that the same misinformation was given to the U.S. Attorney in Philadelphia by AVRADCOM personnel in an effort to prompt a criminal investigation and a suspension of UTI. (The suspension was rejected for lack of evidence.)

In conclusion, I again re-assert that I have been tortiously injured by the individual defendants and the United States.

s/ Eugene Kisielowski
EUGENE KISIELOWSKI

Affidavit of Eugene Kisielowski with Exhibits

Sworn to and subscribed
before me this 19th day of
April , 1983.

s/ Sally Anne Smith
Notary Public
My Commission Expires June 30, 1985

EXHIBITS ANNEXED TO FOREGOING AFFIDAVIT

EXHIBIT A

COMMUNICATIONS CENTER 120

USATSARCO4 STL

[illegible] 1-018841A254 09/10/80
10K SIADELPHIA PS
01 PHILADELPHIA PA 9-10-84
TWK 914-761-2160 USATSARCO4 STL
ATTN: MR. WILLIAM D. HUNT, CONTRACTING OFFICER
ORDAV-POE

SUBJECT: CONTRACT DAAK50-79-C-0037
SLING CARGO AERIAL

REFERENCE (A) GOVERNMENT CORRESPONDENCE BY MR. W.D. HUNT
CONTRACTING OFFICER, DRDAV-PDE, DATED 28 AUG 80

GENTLEMEN:

WE REPRESENT UNITED TEREK, INC. (UTI). ON BEHALF OF UTI, WE HEREBY SUBMIT THE FOLLOWING INFORMATION IN RESPONSE TO REFERENCE (A).

(1) THE REASON FOR UTI'S INABILITY TO DELIVER THE COMPLETE FIRST ARTICLE REPORT ON TIME IS THE DELAY IN RECEIPT OF RAW FORGINGS FROM ITS BRITISH SUPPLIER, WHOSE PRODUCTION WAS COMPLETELY STOPPED DUE TO A *PROLONGED NATIONAL STEEL* STRIKE. THIS CAUSE FOR DELAY WAS OBVIOUSLY BEYOND UTI'S CONTROL AND WITHOUT FAULT OR NEGLIGENCE ON ITS PART OR ON THE PART

Exhibit A

OF THEIR SUBCONTRACTOR AND IS CONSIDERED TO BE AN EXCUSABLE DELAY BY DAR 7-203.11.

(2) PLEASE BE ADVISED THAT DESPITE THE ADVERSE CIRCUMSTANCES DESCRIBED ABOVE, UTI IS PROCEEDING DILIGENTLY IN PERFORMANCE OF THE SUBJECT CONTRACT. SPECIFICALLY, UTI WILL SUBMIT A REVISED SCHEDULE FOR THE FIRST ARTICLE TESTING, IMMEDIATELY UPON RECEIPT OF RAW FORGINGS WHICH ARE NOW PROMISED FOR 19 SEPT 80.

(3) WE ADVISED UTI TO SUBMIT ITS RESPONSE TO YOUR OTHER REQUESTS AS SET FORTH IN YOUR LETTERS OF 23 JUNE AND 21 JULY 1980, REGARDING A NUMBER OF POSSIBLE DESIGN CHANGES IN THE SUBJECT CONTRACT. THIS IS SUBJECT TO *YOUR RESPONSE* PERTAINING TO THE SUBJECT MATTER.

(4) WE RESPECTFULLY RESERVE OUR RIGHTS TO REPLY FURTHER TO YOUR CORRESPONDENCE REFERENCE (A), AT A LATTER DATE, IF SUCH RESPONSE IS REQUIRED.

SIGNED
THEODORE M. KOSTOS, ESQUIRE
STASSEN KOSTOS AND MASON
2300 TWO GIRARD PLAZA
PHILADELPHIA PA 19102
TWK 831496 STADELPHIA PA

1453 EST

USATSARCO4 STL

EXHIBIT B

31 01 123900Z SEP 40 RR 0000 2563930Z

COMMANDER US ARMY AVIATION RESEARCH AND DEVELOPMENT

COMMAND 4300 GOODFELLOW BLVD ST LOUIS MO

STASSEN, KOSTOS AND MASON ATTN: THEODORE M KOSTOS

2300 TWO GIRARD PLAZA PHILADELPHIA PA

UNCLB*AS

SUBJ: CONTRACT DAAK50-79-C-0037

A. UU INFO MASTER 1-018841A254 09/10/80

YOUR TWX ALLEGES EXCUSABLE DELAY AS THE REASON FOR UTI'S INABILITY TO DELIVER THE FIRST ARTICLE REPORT ON TIME, NAMELY A BRITISH STEEL STRIKE. PLEASE FURNISH US WITH PARTICULARS OF THE STRIKE, I.E., WHEN IT BEGAN AND WHEN IT ENDED, AS WELL AS COPIES OF YOUR DATED PURCHASE ORDERS FOR BRITISH STEEL. WE WILL EVALUATE THIS INFORMATION WITH REGARD TO THE DEFAULT CLAUSE, GENERAL PROVISION L.1.11 OF OUR CONTRACT. WE REGARD YOUR PROVIDING THE ABOVE-REQUESTED INFORMATION AS PART OF YOUR RESPONSE UNDER OUR SHOW CAUSE LETTER OF 28 AUG 80. THEREFORE, THE RESPONSE TIME OF 10 DAYS UNDER THAT LETTER IS EXTENDED UNTIL 22 SEP. WE STILL AWAIT A COST PROPOSAL AS REQUESTED IN

Exhibit B

OUR 23 JUNE AND 21 JULY LETTER'S REGARDING POSSIBLE DESIGN CHANGES. YOU REFER TO THIS IN PARA. [3] OF YOUR TWX. THE LAST SENTENCE OF THAT PARAGRAPH IS UNINTELLIGIBLE.

WILLIAM D. HUNT, CONTRACTING OFFICER
DRDAV-PDE, 12364at, 12 SEP 80

WILLIAM D. HUNT, KO, 1236
s/W.D.H.

UNCLASSIFIED

USACO ST. LOUIS
12 SEP 80 20 19z
COMMUNICATIONS CENTER

EXHIBIT C WITH ATTACHMENTS

M
WU INFOMASTER

STADELPHIA PHA

0 20222A266 1450EST

ZCZC 11 PHILADELPHIA PA 9-22-80
TWX 910-761-2160 USATSARCOM STL
ATTN: MR. WILLIAM D. HUNT, CONTRACTING OFFICER
DRDAV-PDE

BT

SUBJECT: CONTRACT DAAK50-79-C-0037
SLING CARGO AERIAL

GENTLEMEN:

ON BEHALF OF UNITED TEREX, INC. ("UTI") AND IN RESPONSE TO YOUR LETTER DATED 28 AUGUST 1980 AND YOUR TWX DATED 13 SEPTEMBER 1980 WE SUBMIT THE FOLLOWING INFORMATION (THE REFERENCED ATTACHMENTS ARE BEING FORWARDED UNDER SEPARATE COVER VIA EXPRESS MAIL):

THE BRITISH STEEL INDUSTRY WAS CRIPPLED BY A NATION-WIDE STRIKE WHICH COMMENCED ON JANUARY 2, 1980, AND CONTINUED UNTIL MARCH 31, 1980. UTI HAD REQUESTED PRICE QUOTATIONS FROM BRITISH FORGERS PRIOR TO BID OPENING (ATTACHMENT "A"), RECEIVING A QUOTATION VIA

TWX ON OCTOBER 12, 1979 (ATTACHMENT "E"). THIS QUOTATION WAS CONFIRMED BY LETTER DATED JANUARY 25, 1980 (ATTACHMENT "C"). ON MARCH 30 1980, UTI ISSUED ITS PURCHASE ORDER NO 0201, FOR THE NECESSARY FORGINGS (ATTACHMENT "D"). BY TWX DATED MARCH 10, 1980, THE FORGER INFORMED UTI THAT IT WAS UNABLE TO MEET THE DELIVERY SCHEDULE DUE TO THE STEEL STRIKE (ATTACHMENT "E"), THEREAFTER WITHDRAWING FROM ITS CONTRACTUAL OBLIGATION BY TWX DATED MARCH 21, 1980 (ATTACHMENT "F").

WHEN UTI RECEIVED THE TWX INDICATING THE FORGER COULD NOT MEET THE DELIVERY SCHEDULE (MARCH 10, 1980 - ATTACHMENT "E"), IT IMMEDIATELY SOUGHT AN ALTERNATE SOURCE, SENDING OUT A TWX THAT SAME DATYY (DAY), MARCH 10TH (ATTACHMENT "G"). UTI RECEIVED A POSITIVE RESPONSE FROM THE ALTERNATE SOURCE, VIA TWX ON MARCH 13, 1980 (ATTACHMENT "H"). BY TWX DATED MARCH 18, 1980 (ATTACHMENT "I"), UTI ISSUED ITS ORDER AND ISSUED CONFIRMING PURCHASE ORDER NO. 0202 ON MARCH 20TH (ATTACHMENT "J"). UTI AUTHORIZED THE FORGER TO PURCHASE STEEL FOR THE ENTIRE PRODUCTION ORDER ON APRIL 7, 1980 (ATTACHMENT "K").

ON APRIL 14, 1980, UTI RECEIVED A TELEX FROM ITS NEW FORGER INDICATING THAT IT COULD NOT MEET THE JUNE 9TH DELIVERY DATE FOR THE FIRST ARTICLE DUE TO THE STEEL STRIKE AND INDICATING THAT IT COULD NOT DELIVER UNTIL MID-AUGUST

(ATTACHMENT "L"). BY LETTER DATED 21 APRIL 1980, UTI, CONFIRMING AN EARLIER TWX, UTI AUTHORIZED THE FORGER TO PROCEED WITH PRODUCTION IN ACCORDANCE WITH ITS REVISED DELIVERY SCHEDULE (ATTACHMENT "M").

BY TWX DATED SEPTEMBER 4, 1980, UTI REQUESTED A STATUS REPORT ON DELIVERY OF THE FIRST ARTICLE SAMPLES (ATTACHMENT "LN" "N"). BY TELEX DATED SEPTEMBER 11TH, THE FORGER ADVISED THAT IT WAS SENDING THE SAMPLES VIA AIR FREIGHT (ATTACHMENT "O"). FINALLY, ON SEPTEMBER 12TH, UTI WAS ADVISED VIA TELEX OF FLIGHT DETAILS FOR PICK UP OF SAMPLES (ATTACHMENT "P"). THE SAMPLES, CONSISTING OF 10 EACH 10K AND 25 GRAB HOOKS, WERE PICKED UP ON SEPTEMBER 15, 1980.

AS YOU CAN SEE, UTI'S DELIVERY SCHEDULE WAS COMPLETELY DISRUPTED BY THE BRITISH STEEL STRIKE. WE RESPECTFULLY SUBMIT THAT THE DELAY IN THIS CASE IS EXCUSABLE. MAY WE NOTE THAT UTI IS IN THE PROCESS OF PREPARING COST PROPOSALS FOR THE CHANGES SUGGESTED IN YOUR LETTER OF 23 JUNE AND 21 JULY, 1980. THESE WILL BE SUBMITTED UPON YOUR ADVICE THAT UTI WILL BE PERMITTED TO CONTINUE PERFORMANCE OF THE SUBJECT CONTRACTS.

Exhibit C with Attachments

SIGNED
THEODORE M. KOSTOS, ESQUIRE
STASSEN KOSTOS AND MASON
2300 TWO GIRARD PLAZA
PHILA PA 19102
TLX 831 496 STADELPHIA PHA
TELE (215) 569 4530

cc: Kisielowski
9-22-80

ACCEPTED
00011

1-PC

Exhibit C with Attachments

STASSEN KOSTOS AND MASON

Law Officers
2300 Two Girard Plaza
Philadelphia, Pennsylvania 19102

Telephone: (215) LOcust 9-4530
Cable Address: Stadelphia Pha
Telex 831-456

September 22, 1980

Mr. William T. Hunt
Contracting Officer
Department of the Army
HQ, US Army Aviation Research
and Development Command
4300 Goodfellow Blvd.
St. Louis, MO 63120

Re: United Terex, Inc.
Contract No. DAAK-50-79-C-0037

Dear Mr. Hunt:

Enclosed please find the attachments referenced in our TWX of this date (copy enclosed).

Sincerely,

s/ Marc Lamer
Marc Lamer

ML:cl
Encls.

Exhibit C with Attachments

UNITED TEREX, INC.

2150-1330
TWX5106610

Dublin Hall, Suite 3
1777 Walton Road
Blue Bell, Pa. 19420

Ref: UT-1831/Gen.

14 August 1979

British Consulate General
2320 PSFS Building
12 S. 12th Street
Philadelphia, Pa. 19107

Attention: Mr. Percy Norris

Subject: Working Relationship with British Firms

Reference: (a) Telcon between Mr. Percy Norris of British Consulate and Mr. E. Kisielowski of United Terex, Inc. (UTI), dated 14 August 1979.

Enclosure: (1) Shackle-Sling 10K (7075-T73 Aluminum), P/N 38850-00006-105F, U.S. Army Drawing No. 38850-00006, Sheets 1 of 4 and 2 of 4; Qty 5,780 each.

(2) Shackle-Sling 25K (4130 Steel), P/N 38850-00006-06F, U.S. Army Drawing No.

Exhibit C with Attachments

38850-00006, Sheets 3 of 4 and 4 of 4; Qty 6,700 each.

(3) Grab Hook-Sling 10K (4130 Steel), P/N 38850-0001 101F, U.S. Army Drawing No. 38850-00013, Sheets 1 of 4 and 2 of 4; Qty 5,780 each.

(4) Grab Hook-Sling 25K (4130 Steel), P/N 38850-0001 106F, U.S. Army Drawing No. 38850-00013, Sheets 3 of 4 and 4 of 4, Qty 6,700 each.

(5) Forging 10,000 lb. Hook (4340 Steel), P/N 6020, Sheets 1 of 2 and 2 of 2; Qty 7,300 each.

(6) Forging Apex Fitting (4340 Steel), P/N 6019, U.S. Army Drawing No. 6019, Sheet 1 of 2 and 2 of 2; Qty 1,825 each.

Page 2

Ref: UT-1831/Gen.

14 August 1979

Dear Mr. Norris,

In compliance with our telcon, Reference (a), I herewith submit design drawings, Enclosures (1) thru (6) for the forgings.

Exhibit C with Attachments

We have already submitted our bids to the Government, for the systems involving Shackles and Grab Hooks (Enclosures 1 thru 4). We will only need prices for these items if we win the contract, which should be known next week. The forgings shown in Enclosures (5) and (6) are for the forthcoming open competition. We would like to obtain British quotes for these items by no later than 5 September 1979.

Basically, in addition to the capabilities we have already acquired through a number of British firms, we require forging firms. The forging capabilities should include

- close die forging
- drop hammer open die forging

in both aluminum and forging grade steel.

I will give you a status progress report on the developments with the British firms, at a later date.

Thank you for your help.

Sincerely,

UNITED TEREX, INC.

s/ E. Kisielowski
E. Kisielowski
President

EK/gr

EXHIBIT D

UNITED TEREX, INC.

215-631-1800
TWX 510-660-0710

2579 Industry Lane
West Norriton Industrial Park
Fairview Village, PA 19403

UT-2018/C-9102/46

23 October, 1980

U.S. Army Aviation Research & Development Command
4300 Goodfellow Boulevard
St. Louis, MO 63120

Attention: Mr. William D. Hunt
Contracting Officer, DRDAV-PDE

Subject: Contract DAAK50-79-C-0037. Foreign Forging Sources Developed by United Terex, Inc. (UTI).

Reference: (a) Telcon between Mr. A. Lewicki of DCASMA Philadelphia, DCRP-GACM, and Mr. E. Kisielowski of United Terex, Inc., (UTI), dated 21 October, 1980.

(b) Telcon between Mr. W.D. Hunt of AVRADCOM, DRDAV-PDE, and Mr. E. Kisielowski of United Terex, Inc., (UTI), dated 22 October, 1980.

Exhibit D

Gentlemen:

The following is submitted in response to the telephone conversations References (a) and (b):

1. United Terex, Inc., (UTI) considers its foreign sources of supply of raw forgings as a *closely guarded trade secret,* having a direct impact on our competitive posture and the future development of our small business corporation. UTI has expended considerable time and effort to develop and qualify these Forging Sources and is currently seeking an exclusive representation of these Sources in the U.S.A.

2. Furthermore, we are not required by ASPR or any other existing Government procurement regulation to disclose our carefully developed proprietary business data to the Government, or any other party. For this reason we have elected to white-out the names of our British Forging Suppliers from the documentation submitted to you previously.

3. However, if it was critically important and in the best interests of the Government, UTI would consider disclosing the Forging Sources provided that the Government would furnish UTI a written guarantee that such sources will be regarded and preserved by the Government as confidential and, in the event that this UTI proprietary business data is intentionally or unintentionally disclosed to any third parties, the Government will pay UTI damages to the extent to be ascertained at a later date.

4. UTI strongly believes that the information and documentation submitted to date (even with the names of our Forging Suppliers intentionally removed) is more than adequate to enable a determination by the Contracting Officer of "Excusable Delay" as anticipated under DAR 7-203.11.

Exhibit D

We look forward to a prompt completion of your exhaustive "show cause" proceedings which by now have consumed considerable energy and resources of our small business company, trying to the best of its ability to serve the Government.

Sincerely,

UNITED TEREX, INC.

s/ E. Kisielowski
President

EK/la

cc: Mr. A. Lewicki, DCRP-GACM
DCASMA Philadelphia

Stassen, Kostos & Mason
UTI - Legal

Exhibit D

United Terex, Inc.

2579 Industry Lane • West Norriton Industrial Park
Fairview Village, PA 19403

RETURN RECEIPT
REQUESTED

U.S. Army Aviation Research & Development Command
4300 Goodfellow Boulevard 20
St. Louis, MO 63120

Attention: Mr. William D. Hunt
Contracting Officer, DRDAV-POE

BEST AVAILABLE COPY

EXHIBIT E

DRDAV-PDE 31 October 1980

SUBJECT: Contract DAAK50-79-C-0037

Mr. Eugene Kisielowski
United Terex, Incorporated
2579 Industrial Lane
West Norriton Industrial Park
Fairview Village, PA 19403

Dear Mr. Kisielowski:

Reference:

a. Telecons between W. Hunt and E. Kisielowski, 28 and 29 October 1980, and W. Hunt and T. Kostos, 29 October 1980.

b. Your letter dated 23 October 1980.

The referenced telephone conversations extensively discussed our previous request that you furnish the names of your British forging sources. Mr. Kostos' response to that request was that we have a meeting to further discuss it. I decided against a meeting because I see no reason for you to incur the time and expense involved in coming to St. Louis. Mr. Kostos acquiesced and agreed that you would furnish the requested information.

Yesterday, the day after our phone conversation, I received reference (b) letter, paragraph 3 of which sets out the terms under which you will furnish the names. I cannot agree to the written guarantee you ask for. As I told Mr. Kostos in reference (a) phone conversation, the only persons who will have access to these names

Exhibit E

are myself and Carol Rosenbaum, my legal advisor. Mr. Kostos said in reference (a) that the information would be furnished under the Trade Secrets Act, 18 U.S.C. 1905. I believe that this statute gives full protection to your submission. I agree to treat the names of your forging suppliers as confidential information under that statute.

Sincerely,

s/ W.D.H.
WILLIAM D. HUNT
Contracting Officer

Exhibit E

WU INFOMASTER

STADELPHIA PHA

013192C308 1501EST

ZCZC 036 PHILADELPHIA PA 11/3/80
TWX 910-761-2160 USATSARCOM STL
ATTN: MR. WILLIAM D. HUNT, CONTRACTING OFFICER
DRDAV-PDE
BT

SUBJECT: CONTRACT DAAK50-79-C-0037
SLING CARGO AERIAL

PURSUANT TO YOUR TELEGRAM OF 27 OCTOBER 1980 AND OUR TELEPHONE CONVERSATION OF 29 OCTOBER 1980. FOLLOWING ARE THE UNITED KINGDOM SOURCES FOR RAW FORGINGS:

SOURCE A (WITHDREW ON ACCOUNT OF STRIKE)

THOS. P. WELLINGS & CO. LTD.
THORNS RD
BRIERLEY HILL
W. MIDLANDS, DY5 2HZ
ENGLAND

MR. F.T. WELLINGS, MANAGING DIRECTOR
MR. L.Q. JONES, SALES DIRECTOR

TELEPHONE: 011-44-384-79451
TELEX: 338110 (TBW QE G)

EXHIBIT F WITH ATTACHMENT

UNITED TEREX, INC.

215-631-1800
TWX 510-660-0710

2579 Industry Lane
West Norriton Industrial Park
Fairview Village, PA 19403

UT-2046/C9102-46

4 December, 1980

U.S. Army Aviation Research & Development Command
4300 Goodfellow Boulevard
St. Louis, MO 63120

Attention: Mr. William D. Hunt
Contracting Officer DROAV-PDE

Subject: Contract DAAK50-79-C-0037
Rope Cyclic Test Change Proposal

Reference: (a) Specification MIL-S-DRDAV-EXH-79-1, Para. 4.5.7

(b) Meeting at AVRADCOM, July 1, 1980

(c) Wyle Lab Report 46161-1

Enclosures: (1) UTI Test Report No. 0046-1

Exhibit F with Attachment

Gentleman:

United Terex, Inc. (UTI) herein presents the test results, Enclosure (1), of UTI sponsored tests to substantiate the technical inadequacy of the rope cycle test specifications contained in the subject contract. The inadequacy lies in the fact that it is technically unfeasible and physically impossible to apply the load ranges at the frequency specified in the contract, see Reference (a1).

The reason for this is that the rope cannot respond rapidly enough, thus causing a separation of the jack (load applicator) from the rope. At the instant of separation the load on the jack is zero and the load in the rope, although it cannot be readily determined, is close to its maximum applied value.

At the July 1, 1980, AVRADCOM meeting, Reference (b), we presented a test report, Reference (c), which represented our attempt to comply with the requirements, stating at the time that the specified test was unfeasible in that equipment capable of the amount of displacement required for the load levels was not available and, *even if it were,* the rope could not respond because of its much slower natural frequency. Furthermore, we stated that displacement of the actuating cylinder did not represent applied load because of the rope separation created by the high cyclic rate.

Since that time we have made exhaustive efforts to comply with these requirements without success. Enclosure (1) details our testing efforts and conclusions and includes supporting documentation. We have determined that the natural frequency of response of this type of rope in the sizes in question cannot exceed 1.5 Hz and that heat buildup, impact loads and hysteres effects effectively reduce this response frequency to considerably below 1 Hz. Therefore, testing at rates above that is unfeasible and meaningless.

Exhibit F with Attachment

This letter and its enclosures constitute our initial submittal of a request for redirection of the cyclic testing requirements contained in the subject contract.

Sincerely,

UNITED TEREX, INC.

s/ E. Kisielowski
President

EK/ns

Exhibit F with Attachment

UNITED TEREX, INC.

215-631-1800
TWX 510-660-0710

2579 Industry Lane
West Norriton Industrial Park
Fairview Village, PA 19403

UTI Test Report 0046-1

Rope Assembly Cyclic Testing

Contract DAAK50-79-C-0037

December 3, 1980

1.0 Introduction

The contract requires that one each of P/N 38850-0009-055 and -056 rope assemblies be tested under the following requirements, as detailed in Para. 4.5.7. of Mil-S-DRDAV-EXH-79-1

P/N	Cycle Load ±3%	Frequency
-055	4000 ± 2000 lbs.	4 Hz
-056	8000 ± 4000 lbs.	4 Hz

The duration of the cyclic test shall be 20 hours for each rope.

Exhibit F with Attachment

2.0 Procedures and Results

2.1. Wyle Laboratories Testing - Wyle Report No. 45161-1 (Exhibit 1)

2.1.1. Test Setup

The rope was stretched between two cylinders. One was fixed and the other, equipped with a servo valve, was used to apply the cycle load. A servo controller maintained the frequency and displacement of the cycling cylinder, however, it did not control the applied load.

2.1.2. Procedure

The rope was loaded to the high end of the load range and the servo controller limit was set. The rope was then unloaded to the low end of the load range with the lower controller limit being set accordingly. When cycling commenced it was found that the test system did not have the capacity to move the actuating cylinder (at the cyclic rate of 4 Hz) through the displacement required. The stretch in the ropes over these load ranges is in the order of 4-½ inches.

After much experimentation it was decided to reduce the load range by half to the following: 4000 lbs. to 6000 lbs. for the small rope and 8000 lbs. to 12000 lbs. for the large.

2.1.3. Results

One each of the ropes successfully underwent the 20 hour duration test at these load ranges. It was observed during the cycling that the ropes had the appearance of being under static load. No heat buildup was apparent at this frequency.

Exhibit F with Attachment

2.2. Lehigh University Testing — Lehigh Report 200.80.504.2 (Exhibit 2)

2.2.1. Test Setups and Results

Several attempts were made to obtain a test setup that would reduce the amount of elongation to be accommodated by the actuating cyclinder. Although these attempts were not successful because of the characteristics of the rope under load, especially the reduction in diameter by a factor of 2, one observation was noted consistently. In all cases the actuating jack separated from the rope during the unloading cycle leaving the rope momentarily in a free state.

2.2.2. Natural Frequency Measurement

Static tests were performed on each size rope to determine their theoretical natural frequencies. The elongation of the rope over the load range was measured and the natural frequency calculated for a free weight equal to the mid point of the applied load range.

For both ropes the natural frequency was calculated to be approximately 1.5 Hz. However, it is considered that impact loading, frictional and hysteresis effects reduce this in practice to less than 1 Hz.

3.0 Conclusions

The cycle test, as specified in the work statement, is technically unfeasible in that the rope is unable to respond at the required rate. Exhibit 3 displays the relative positions and conditions of

the rope eye and load-applying pin. Immediately as the pin starts to move back from its peak load position it separates from the rope. At this instant the load experienced by the pin is zero. At the same time the rope starts to shed its kinetic energy as rapidly as it is capable of doing. At some point during this energy-shedding process the pin, which has reached the lower displacement limit and started back to the upper limit, impacts the rope, reapplying the upper limit load. Consequently, the rope oscillates between the upper load limit and some slightly lower load that cannot be determined without considerable extra experimentation outside the scope of the test requirements. This conclusion is supported by the opinion of an engineering representative of the developer of this type of double braided rope, Exhibit 4.

4.0 Recommendations

It is understood that the test requirements were formulated on the basis of determination and measurement of the real-life environment of the rope assembly. The shackle-end eye of the rope experiences the characteristic vibration of the helicopter, transmitted through the helicopter hook and the system shackle. This vibration appears to be effectively damped by the first few feet of the rope. In addition, the body of the rope experiences a very slow cyclic loading caused by the 'bouncing' of the payload transmitted through the chains and grab hooks. This cyclic loading is a function of the payload characteristics and flight profile.

Since these two loading patterns are separate in origin and different in characteristics, it appears to be both logical and feasible to test the rope assemblies under each load pattern separately, i.e. a high frequency low amplitude vibration test and a low frequency large amplitude cycle test.

Exhibit F with Attachment

4.1. Vibration Testing

We recommend that the rope assembly be loaded to the mid-point load (4000# for the small and 8000# for the large rope) and held at the load while one eye is subjected to a 4 Hz vibration with a displacement equivalent to that experienced by the helicopter hook (expected to be less than 1/8 inch). The duration of the test may be 20 hours, as presently required.

4.2. Cycle (Bounce) Test

The entire length of the rope should be cycled through an applied load range equal to that presently stated, but at a cyclic rate of no more than ½ Hz.

EXHIBIT G WITH ATTACHMENT

DRDAV-PDE

SUBJECT: Contract DAAK50-79-C-0037, United Terex Incorporated

12 DEC 1980

Mr. E. Kisielowski
United Terex Incorporated
2579 Industry Lane
West Norriton Industrial Park
Fairview Village, PA 19403

1. Reference:

a. United Terex DD 1694, Request for Deviation/Waiver submittal, 4 December 1980.

b. Verbal request of 4 Dec 1980 for permission to Test Sling Hardware independent of Sling Leg's.

2. Attached hereto is a signed copy of DD 1694, approving Deviation from 4130 Material to 4140 or 4340 material. Drawings 38850-00006 and 38850-00013 will be changed to include all 3 types of material at a later date.

3. Permission is hereby granted to perform First Article Testiall Sling Hardware independent of the Sling Leg's.

4. All other terms and conditions of the contract remain in full force and effect.

WILLIAM D. HUNT
Contracting Officer

Exhibit G with Attachment

REQUEST FOR DEVIATION/WAIVER (See MIL-STD-480 OR 481 FOR INSTRUCTIONS)

DATE PREPARED: 10/03

1. ORIGINATOR NAME AND ADDRESS: United Terex, Inc., 2579 Industry La., Fairview Village, PA

2. [X] DEVIATION [ ] WAIVER; [ ] MINOR [ ] MAJOR [ ] CRITICAL

4. DESIGNATION FOR DEVIATION/WAIVER

a. MODEL/TYPE	b. MFR. CODE	c. SYS. DESIG.	d. REVISED NO.
	3L266		UT4601

5. BASE LINE AFFECTED: [ ] FUNC. CONFIG. [ ] ALLOCATED [ ] PROD. CFG.

6. OTHER SYSTEMS/CONFIGURATION ITEMS AFFECTED: [ ] YES [ ] NO

7. SPECIFICATIONS AFFECTED-TEST PLAN

	MFR. CODE	SPEC./DOC. NO.	SCN
a. SYSTEM			
b. ITEM			
c. TEST PLAN			

8. DRAWINGS AFFECTED

MFR. CODE	NUMBER	REV.	ADD. NO.
56546	38850-00006Sh3	A	
56546	38850-00013Sh1	G	
56546	38850-00013Sh3	B	

9. TITLE OF DEVIATION/WAIVER: To allow optional materials

10. CONTRACT NO. & LINE ITEM: DAAK50-79-C-C017 CLIN 0001

11. CONFIGURATION ITEM NOMENCLATURE: Sling Assembly

12. CI NO.: 13. SERIAL NO.: 14. DEFECT CLASSIFICATION: [ ] MINOR [ ] MAJOR [ ] CRITICAL

15. NAME OF FIRST OR LOWEST ASSEMBLY AFFECTED: Shackle, Grab Hook

16. PART NO. OF ITEM BEING: 10K & 25K

17. LOT NO.: 18. QTY: All

19. RECURRING DEVIATION/WAIVER: [ ] YES [X] NO

20. EFFECT ON CONFIDENCE: None

21. EFFECT ON DELIVERY SCHEDULE: None

22. EFFECT ON INTEGRATED LOGISTIC SUPPORT, INTERFACE, ETC.: None

23. DESCRIPTION OF DEVIATION/WAIVER

In Note 3 of Dwg. 38850-00006 Sheet 3, Note 4 of Dwg. 38850-00013 Sheet 1, and Note 4 of Dwg. 38850-00013 Sheet 3 add the following:

. . . or 4140 per MIL-S-5626 or 4340 per MIL-S-5000.

No effect on Para. 5.2 of MIL-STD-481

24. NEED FOR DEVIATION/WAIVER

Drawings presently require the use of 4130 material. Forging companies develop expertise and familiarity with other alloys and consider them more suitable for high strength applications. While 4130 is suitable for the applications in question, it is felt that allowing the use of the optional materials will help to ensure satisfactory manufacture of the end items.

25. PRODUCTION EFFECTIVITY BY SERIAL NUMBER: All

26. SUBMITTING ACTIVITY AUTHORIZING SIGNATURE: Jerome Fox — TITLE: Director of Engineering

27. APPROVAL/DISAPPROVAL

a. [ ] APPROVAL RECOMMENDED — b. [X] APPROVED [ ] DISAPPROVED

c. GOVERNMENT ACTIVITY — SIGNATURE: William D. Hunt — DATE: 12 DEC 1980

DD FORM 1692

BEST AVAILABLE COPY

EXHIBIT H

DRDAV-EGC Trip Report

TO DRDAV-EG FROM DRDAV-EGC

DATE Mr. L. Plog/dw/1617

1. Purpose:

a. To verify the Sling First Article Cyclic Load Test.

b. To Witness Presco Intl's First Article Cyclic Load Test.

2. Itinery: St. Louis, MO to and return to St. Louis, MO.

3. Dates: Departed St. Louis, MO. 4 Jan 81 and reported at 0930 hrs, 5 Jan 81. Departed , 2030 hrs, 10 Jan 81 and arrived in St. Louis, MO. 11 Jan 81.

4. Personnel Contacted:

a. Test Director
Test Project Engineer
Marketing
Contracts
Engineer

b.

c. Presco Int'l Inc: Mr. Paul Sandness
Mr. Steve Sandness

Exhibit H

d. DCASR: Mr. William Adler

e. Flight Standards & Dev., Dir: Mr. William Hamilton

5. Discussion:

5.1. Background. The second production contractor, United Terex, Philadelphia, PA, has challenged the Government that the First Article Cyclic Load could not be accomplished because of inadequate nylon rope response. The contractor also hinted that temperature may be a problem, but did not gather test data as he did for rope response. Presco Int'l, New Cumberland, PA, was going to attempt a cyclic load first article 6 Jan 81.

5.2. Test Conduct. incurred set and test instrumentation problems on Jan 5-6. These were corrected and a brief trial conducted 7 Jan 81. Useful data became available 8, 9 & 10 Jan. Initial effort consisted of proving that the strain gauge load input pin was tracking exactly with the far end restraining pin which had a load cell in tension. Calibration curves showed a linear relationship in the cyclic load range but became slightly non-linear at proof loads. Since the cyclic load ranges are less than half the proof loads, no problem was incurred. Although not specifically stated in the statement of work, sweeping the frequency range from 1.0 Hertz to 5.0 Hertz in ½ Hertz increments for each of four load ranges seemed to be easily accomplished, but somewhat time consumming. cooperated in this endeavor and the data was obtained. In addition, thermocouples were placed on the rope cover, between the rope cover and core, and test ambient temperature was measured. Instrumentation confusion resulted in the large rope temperature data being lost during frequency sweeping. The two hour run was accomplished on the 7/8 inch

dia rope. Marginally acceptable high temperatures were found. The first one hour run on the 1¼ inch dia rope confirmed even higher unacceptable temperature levels. Therefore, a revised specification load and frequency requirement was accomplished in the remaining time. With adequate response data on hand and an acceptable revised cyclic load test available, the contracting officer and Presco representatives were then engaged in a fonecon conference leading to a contract modification. The contractor attempted a First Article cyclic load test date Sat, 10 Jan 81, but unfortunately, the cone separated internally about one hour into the test and the testing was terminated.

6. Preliminary Test Results:

6.1. At cycle load levels and below, the Governments test data showed no unloading at the input pin as challenged by United Terex. The loads at the input pin calibrated to deflection of the pin, related in magnitude and phase angle to the opposite restraining pin, as measured there by load cell. As a result, it is possible to control spec input loads from the driven end or the restraining end.

6.2. Stabilized temperature levels in the 7/8 inch diameter rope were as high as 250°F, and were as high as 317° in the 1¼ inch diameter rope. According to Dupont, the strength of nylon starts dropping off at 250°F and will be down to 85% of normal strength, 315°F. On this basis, the spec load range and frequency was lowered for a large portion of the time to allow the testor to cool his rope at lower values by switching from the original specification high valve to a lower valve. At 30°F ambient temperatures, the large rope (worse case) could be run about 13 minutes before temperatures reached 200°F and then would cool to around 100°F within approximately 30 minutes at a lower load

Exhibit H

range and frequency. Presco, Int'l had no trouble controlling temperature in their ill-fated attempt.

7. Conclusion: the contractor challenge of inadequate rope response is not valid. The Government's original First Article cycle load test cannot be accomplished without undue risk because of unacceptable high rope temperatures. An acceptable test has been prepared and verified. The high load range and frequency is needed to show eye splice/cone integrity with a high confidence level. Reduction of the specification to the present levels should be adequate to insure a good product from contractors attempting to become qualified producers.

s/ Lem Plog
LEM PLOG
Aerospace Engineer

EXHIBIT I WITH ATTACHMENTS

DEPARTMENT OF THE ARMY
HQ, US Army Aviation Research and Development Command
4300 Goodfellow Boulevard, St. Louis, MO 63120

DRDAV-PDE

13 Jan 81

United Terex, Inc.
2579 Industry Lane
West Norriton Industrial Park
Fairview Village, PA 19403

Gentlemen:

Inclosed is Modification P00004 to Contract Number DAAK50-79-C-0037, issued by this Command.

Read this instrument carefully before signing. If you believe it contains any error or ambiguity, return all copies unsigned to this Command with a statement explaining the change or changes you desire.

If this modification is acceptable, it is requested that all four (4) copies be executed by an authorized representative of your organization and that the original and two (2) signed copies be returned promptly, retaining the remaining copy for your reference purposes. One signed copy will be forwarded to you upon acceptance by this Command. Returned copies should be directed to the attention of the Contracting Officer, Procurement Division, ATTN: DRDAV-PDE.

Exhibit I with Attachments

Request this modification be acknowledged by completing the information indicated below and returning to this Office.

Sincerely,

s/ William D. Hunt
WILLIAM D. HUNT
Contracting Officer

1 Inclosure
As stated (4 cys)

Receipt
Acknowledged:_____
(Signature) (Date)

Exhibit I with Attachments

AMENDMENT OF SOLICITATION/MODIFICATION OF CONTRACT | 1 | 2

1. AMENDMENT/MODIFICATION NO.	2. EFFECTIVE DATE	3. REQUISITION/PURCHASE REQUEST NO.	4. PROJECT NO. (If applicable)
P00004		N/A	

5. ISSUED BY	CODE	W58XJC	6. ADMINISTERED BY (If other than Item 5)	CODE	S2015A
US Army Aviation Research & Development Command, ATTN: DRDAV-PDE 4300 Goodfellow Blvd. St. Louis, MO 63120			DCASMA, Philadelphia P. O. Box 7699 Philadelphia, PA 19101		

7. CONTRACTOR NAME AND ADDRESS (Street, city, county, State, and ZIP Code)	CODE 36266	FACILITY CODE	8. AMENDMENT OF SOLICITATION NO. / DATED (See Item 9) / MODIFICATION OF CONTRACT/ORDER NO. DAAK50-79-C-0037 / DATED 79 Sep 28 (See Item 13)
United Terex, Inc. 2579 Industry Lane West Norriton Industrial Park Fairview Village, PA 19403			

9. THIS ITEM APPLIES ONLY TO AMENDMENTS OF SOLICITATIONS

☐ The above numbered solicitation is amended as set forth in Item 13. The hour and date specified for receipt of Offers ☐ is extended, ☐ is not extended.

Offerors must acknowledge receipt of this amendment prior to the hour and date specified in the solicitation or as amended, by one of the following methods: (a) By completing items 8 and 15, and returning ____ copies of this amendment; (b) By acknowledging receipt of this amendment on each copy of the offer submitted; or (c) By separate letter or telegram which includes a reference to the solicitation and amendment numbers. FAILURE OF YOUR ACKNOWLEDGMENT TO BE RECEIVED AT THE ISSUING OFFICE PRIOR TO THE HOUR AND DATE SPECIFIED MAY RESULT IN REJECTION OF YOUR OFFER. If by virtue of this amendment you desire to change an offer already submitted, such change may be made by telegram or letter, provided each telegram or letter makes reference to the solicitation and this amendment, and is received prior to the opening hour and date specified.

10. ACCOUNTING AND APPROPRIATION DATA (If required)

NO CHANGE

11. THIS BLOCK APPLIES ONLY TO MODIFICATIONS OF CONTRACTS/ORDERS

(a) ☐ This Change Order is issued pursuant to: ____

The Changes set forth in Block 12 are made in the above numbered contract/order.

(b) ☐ The above numbered contract/order is modified to reflect the administrative changes (such as changes in paying office, appropriation data, etc.) set forth in Block 12.

(c) ☒ This Supplemental Agreement is entered into pursuant to authority of: 10 U.S.C. 2304 (a)(10)

(d) Other (Specify type of modification and authority)

12. DESCRIPTION OF AMENDMENT/MODIFICATION

PURPOSE: The purpose of this Modification is to amend MIL-S-DRDAV-EXH-79-1 Slings, Helicopter, External Cargo as follows:

PARAGRAPH 4.5.7.1 First Article Testing: A cyclic load test shall be applied to one each, pe Assembly 38850-0009-055 and -056, for a total of 20 hours minimum consisting of an accumulation of not less than 2 hour intervals. The test shall consist of test conditions as shown below. Total hours required for each specific test condition may be broken up as desired to prevent the material from exceeding its temperature limits through the total 20 hours within the following limitation. It is not permissable to change from a given test condition more than 15 times. Starting and stopping times at beginning and end of test intervals, and transition times from different test conditions cannot be included in the required 20 hours for each test specifiem. At conclusion of testing, the Rope Eye Assembli- shall be inspected and conform to all requirements except ultimate strength testing. The rope assembly shall be proof loaded and inspected for conformance in accordance with PARAGRAPH 4.5.5.2.1. It is permissable to test each end of the rope in separate test or as a full length assembly. As a minimum, the length of rope below the eye splice assembly shall include the ends of the internal rope splice.

Except as provided herein, all terms and conditions of the document referenced in Block 9, as heretofore changed, remain unchanged and in full force and effect.

13. ☐ CONTRACTOR/OFFEROR IS NOT REQUIRED TO SIGN THIS DOCUMENT ☒ CONTRACTOR/OFFEROR IS REQUIRED TO SIGN THIS DOCUMENT AND RETURN 3 COPIES TO ISSUING OFFICE

14. NAME OF CONTRACTOR/OFFEROR		15. UNITED STATES OF AMERICA	
BY (Signature of person authorized to sign)		BY (Signature of Contracting Officer)	
15. NAME AND TITLE OF SIGNER (Type or print)	16. DATE SIGNED	18. NAME OF CONTRACTING OFFICER (Type or print) WILLIAM D. HUST	19. DATE SIGNED

30-105-03 ★U.S. GOVERNMENT PRINTING OFFICE: 1974—554-451

BEST AVAILABLE COPY

Exhibit I with Attachments

CONTINUATION SHEET	CONTRACT NO. / DELIVERY ORDER NO. P00004 DAAK50-79-C-0037	PAGE 2	OF 2

NAME OF OFFEROR OR CONTRACTOR

United Terex, Inc.

PARAGRAPH 4.5.7.2 Cyclic Load Description: A cyclic fatigue load shall approximate a sinusoidal form and shall be with ± 600 pounds of the required load. Momentary spikes exceeding ± 600 pounds allowed providing 10 seconds of spike time is not exceeded in any 5 minute period of test time. Tolerances do not apply during transition. The load and frequencies are as follows:

-056 Rope

Test Condition	Load (Lbs)	Freq (HZ)	Time (Hrs)
A	8000 ± 4000	4.0	1
B	8000 ± 2000	4.0	6
C	8000 ± 3000	2.5	2
D	8000 ± 2000	2.5	11
		Total	20

-055 Rope

Test Condition	Load (Lbs)	Freq (HZ)	Time (Hrs)
E	4000 ± 2000	4.0	1
F	4000 ± 1000	4.0	6
G	4000 ± 1500	2.5	2
H	4000 ± 1000	2.5	11
		Total	20

All other terms and conditions of the contract remain in full force and effect.

DD FORM 1155 (REV. 4-72) PREVIOUS EDITION IS OBSOLETE. (1)

BEST AVAILABLE COPY

EXHIBIT J

UNITED TEREX, INC.

215 -631 1800
TWX 510-660 0710

2579 Industry Lane
West Norriton Industrial Park
Fairview Village, PA 19403

Ref: UT-2079/C-9102/46

10 February 1981

Department of the Army
U.S. Army Aviation Research & Development Command
4300 Goodfellow Boulevard
St. Louis, MO 63120

Attention: Mr. William D. Hunt, DRDAV-PDE
Contracting Officer

Subject: Contract DAAK50-79-C-0037
Sling, Aerial Cargo
Submittal of the First Article Report

Enclosure: (1) Fox, T.M., Arena, C.J. and Kisielowski, E., "First Article Inspection and Test Report, Aerial Cargo Sling." United Terex, Inc. (UTI), Report No. UTR C-9102/46-1, dated January 1981, three (3) copies.

Exhibit J

Gentlemen:

United Terex, Inc. (UTI), is pleased to submit the First Article Test Report, Enclosure (1), for Sling, Aerial, Cargo Components, in accordance with the requirements of Section I-3 of the subject contract.

For clarity and convenience of evaluation this report is submitted in two parts. Part one, attached herein as Enclosure (1), contains the pertinent test data and part two, submitted under a separate cover, presents the relevant Quality Assurance data including inspection records, test reports, material/process certifications, etc. The QA data was transmitted to the Contracting Officer through one of his representatives, Mr. Manly J. Thomas, DRSTS-QVP, who witnessed the tests.

Based on the test data presented herein, all metal components of the First Article exceeded their ultimate design load requirements by substantial margins. As part of the tests a basic design deficiency, currently existing in the contractual drawings, was discovered in the design of the 10K Grab Hook, P/N 38850-00011-041. This deficiency is indicated by the fact that during loading a chain link of the mating chain, P/N 38850-00053-101, bearing against the edge of the V-shaped hook slot slides along and then slips through the slot. An out-of-scope test with parallel hook slot prevented this malfunction, indicating that the V-shape slot inherent in the current design is the source for this deficiency. In view of this finding a contractual redirection is required by the Contracting Officer as to the redesign and retest of the 10K Grab Hooks.

Based on the success of the First Article Testing it is recommended that contractual approval be granted to this report

for all metal components which met and/or exceeded the ultimate design loads and functional requirements. It is further recommended that contractual approval be granted to commit these parts into immediate production.

We look forward to the continued success of the subject program.

Sincerely,

UNITED TEREX, INC.

s/ E. Kisielowski
E. Kisielowski
President

EK/la

cc: Mr. Edward Slade
ACO, Philadelphia

UTI - Legal
Stassen, Kostos & Mason

EXHIBIT K

DEPARTMENT OF THE ARMY

HQ, US Army Aviation Research and Development Command
4300 Goodfellow Boulevard, St. Louis, MO 63120

13 FEB 1981

DRDAV-PDE

United Terex Incorporated
2579 Industry Lane
Norriton Industrial Park
Fairview Village, PA 19403

Gentlemen:

This letter confirms our telecon of 9 Feb 1981 whereby it was agreed to hold a meeting at AVRADCOM on 20 Feb 1981 09:30 to negotiate a price settlement of those items set forth on Modification P00005. Said meeting will further discuss the 10,000 pound capacity Grab Hook.

By this letter you are hereby authorized to proceed with the production of all metal wa applicable to this contract except for the 10,000 pound capacity Grab Hook.

Attached hereto is a modification to Drawing 38850-00013 sheet 2 of 4 setting forth configuration's A & B. Contract DAAK50-79-C-0037 First Article Test is changed as follows: Request that 2 of configuration A and 3 of configuration B be

Exhibit K

fabricated and tested. All dimensions remain the same except for those shown on the sketch.

Sincerely,

s/ William D. Hunt
WILLIAM D. HUNT
Contracting Officer

EXHIBIT L

DEPARTMENT OF THE ARMY
HQ. US Army Aviation Research and Development Command
4300 Goodfellow Boulevard, St. Louis, MO 63120

18 MAR 1981

DRDAV-PDE

SUBJECT: Termination for Default, Contract DAAK50-79-C-0037

United Terex Incorporated
Mr. E. Kisielowski
2579 Industry Lane
Norriton Industrial Park
Fairview Village, PA 19403

Dear Mr. Kisielowski:

Reference is made to your contract DAAK50-79-C-0037 under which you were required to deliver 1,445 each 10,000 lb. aerial cargo slings and 1675 each 25,000 lb. aerial cargo slings. The slings consist of both rope and metal components.

The contract, in paragraph (a) of the Default clause, General provision 11 of Section L, provides that the Govt. may terminate the contract "(1) if the Contractor fails to make delivery of the supplies or to perform the services within the time specified herein or any extension thereof. . . . ." Pursuant to this provision, said contract is hereby terminated for default in its entirety. The basis for this termination is your failure to deliver a first article test report for the rope portion of the contract when it was due on

Exhibit L

13 Feb 81 thus jeopardizing the production of slings due for delivery 30 April 1981.

The contract, which was awarded on 28 Sep 79, originally called for delivery of the first article test report, line items 0001AC and 0002AB, on 13 Jul 80. You did not present it on that date, and it was determined that the delay was excusable. By Modification P0003 to the contract, effective 4 Dec 80, you agreed to present the first article test report by 13 Feb 81, and commence production delivery on 30 April 1981. You submitted a First Article Test Report by letter of 10 Feb 81. This report only addressed testing of the metal components. On page 1 of the report the following was stated: "By contractual redirection, Reference 2, only metal parts of the Sling system had to be tested." Reference 2, on page 32 of the report, is "Government Correspondence by William D. Hunt, Contracting Officer, DRDAV-PDE, dated 12 December 1980." That letter says in paragraph 3: "Permission is hereby granted to perform First Article Test all Sling Hardware independent of the Sling Leg's." (Sic)

In other words, you were granted the authority to test the rope apart from the metal components. Nowhere were you given the authority to extend any testing beyond 13 Feb 81. Nor were you ever given the authority not to perform test of the rope.

Hoping to receive some explanation, I avoided taking any action because you were scheduled to come to St. Louis on 20 Feb 81 to negotiate some changes to the contract. On that date you told me that you had no first article test scheduled for the ropes and had made no contractual or other arrangements to that end.

This default is the direct result of your failure to deliver a test report pertaining to the rope. This letter constitutes my final

Exhibit L

decision and findings of fact that you are in default as specified above and that your failure in performance is not due to causes beyond your control and without your fault or negligence, as set forth in the Default provision. Your right to proceed further with performance on the contract is hereby terminated. The supplies terminated may be procured against your account, and you will be held liable for any excess costs. The Government reserves all rights and remedies provided by law or under the contract, in addition to charging excess costs.

Pursuant to DAR 7-104.35(b), Progress Payment for Small Business, clause 31 of the contract, I hereby demand that you repay the Government the unliquidated progress payments of $472,252 made to you under the contract. You are further reminded that pursuant to these provisions, the Government has title to all parts, materials, inventories, work in progress, special tooling and all other property of the classes enumerated in that subparagraph allowable to this contract which the Government is entitled to retain unless and until you repay the amount demanded of you. You are hereby requested to forward to this office a complete list of all such property. This constitutes the demand necessitated by DAR 7-104.39, interest; unless paid within 30 days all amounts due to the Government under this contract shall bear interest at the rate of 14 5/8%, the rate established by the Secretary of the Treasury under PL 92-41.

Pursuant to DAR E-608 (DPC #76-9, 30 Aug 77), I demand that you repay the $249,461 which was paid to you under progress payment #9 of this contract for which you admittedly incurred no costs. This amount was arrived at in DCAA Audit Report 6181-1E175150, a copy of which has been provided to you. You presented an undated invoice for payment from Elisha Webb and Son Company for $312,262 as part of the supporting

documentation for progress payment #9. The invoice was marked "Pro Forma." The Government discovered after payment that you had not bought the goods for which you were billing. Such an action on your part is in violation of Clause J1, paragraph (a)(2) of the contract, "Progress Payment for Smaller Business Concerns (1978 May)", which states that progress payments are for completed work to which the contractor has acquired title. Since you had not bought the goods, you did not acquire title. Your violation of the progress payment clause amounts to the breach of a material provision of the contract. The Government rests this termination for default on this breach as well as your failure to deliver the first article report on the rope when it was due. The Government reserves all rights and remedies it has at common law for breach of contract based on the violation of this clause.

Any amount not paid within 30 days from the date of this demand will bear interest from today's date at the rate established by PL 92-41, which is 14 5/8%. You may submit a proposal for postponement of payments if immediate payment is not practical or if the amount is disputed.

This is the final decision of the Contracting Officer. This decision may be appealed to the Board of Contract Appeals. If you decide to make such an appeal, you must mail or otherwise furnish written notice thereof to the Board of Contract appeals within 90 days from the date you receive this decision. A copy thereof shall be furnished to the Contracting Officer from whose decision the appeal is taken. The notice shall indicate that an appeal is intended, shall reference this decision, and identify the contract by number. For appeals under the Disputes clause you may, solely at your election, proceed under the Board of Contract Appeals small claims procedure for claims $10,000 or less or their accelerated procedure

Exhibit L

for claims $50,000 or less. If any dispute resulting from the decision hereinabove set forth involves an amount not in excess of $25,000, there is available an Optional Accelerated Procedure of the Board (Rule 12) for disposition of the appeal. To invoke such procedure, the appellant must request that the appeal be processed under Rule 12. In lieu of appealing to the cognizant Board of Contract Appeals, you may bring an action directly in the US Court of Claims within 12 months of the date you receive this decision.

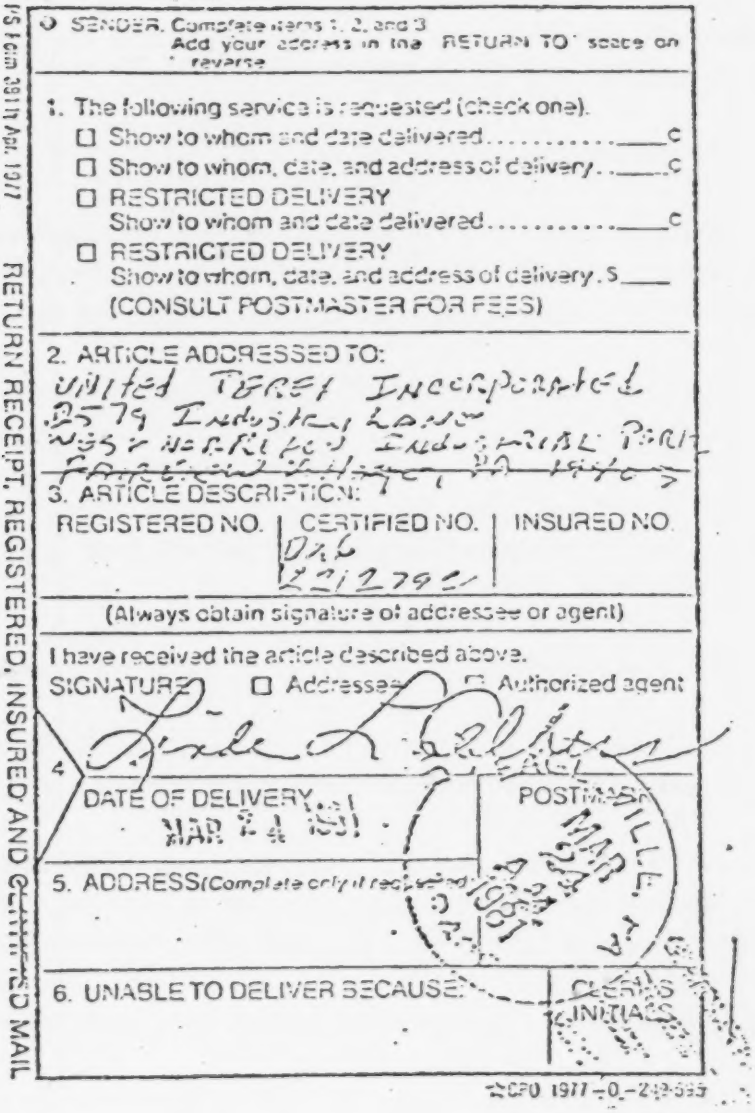
Sincerely,

s/ William D. Hunt
WILLIAM D. HUNT
Contracting Officer

EDITOR'S NOTE

PAGES 135a through 144a WERE POOR HARD COPY AT THE TIME OF FILMING. IF AND WHEN A BETTER COPY CAN BE OBTAINED, A NEW FICHE WILL BE ISSUED.

Exhibit L



PS Form 3811 Apr. 1977 RETURN RECEIPT, REGISTERED, INSURED AND CERTIFIED MAIL

SENDER: Complete items 1, 2, and 3
Add your address in the "RETURN TO" space on reverse

1. The following service is requested (check one).
- ☐ Show to whom and date delivered ..... ¢
- ☐ Show to whom, date, and address of delivery .... ¢
- ☐ RESTRICTED DELIVERY
  Show to whom and date delivered ..... ¢
- ☐ RESTRICTED DELIVERY
  Show to whom, date, and address of delivery . $
  (CONSULT POSTMASTER FOR FEES)

2. ARTICLE ADDRESSED TO:
United Tofet Incorporated
2579 Industry Lane
West Norriton, Industrial Park

3. ARTICLE DESCRIPTION:

REGISTERED NO.	CERTIFIED NO.	INSURED NO.
	D26 221792	

(Always obtain signature of addressee or agent)

I have received the article described above.
SIGNATURE ☐ Addressee ☐ Authorized agent

4. DATE OF DELIVERY MAR 24 1981

POSTMARK MAR 23 1981

5. ADDRESS (Complete only if requested)

6. UNABLE TO DELIVER BECAUSE:

CLERK'S INITIALS

☆GPO 1977—O—242-865

EXHIBIT M

Q. Did I understand you to testify that what Mr. Kisielowski was requesting was permission to test the rope and metal apart?

A. Separately.

Q. Separately. Is there any place in the contract, to your recollection, that states he's required to test them together by together, I mean physically at the same place both rope and metal?

A. No. No, the place of testing is of the contractor's choosing.

Q. So, he was, under the contract, would have been perfectly free to test his metal in Philadelphia, and his rope in Boston, if he wanted to, would he not?

A. That's correct.

Q. Well, then, why would he need your permission to test them apart, test them independently, as your word is?

A. The pull test and that could be done at one time, the rope and the hardware could all be pulled at one time; only the cyclic test would have been a test that had to have been done, the cyclic test of the rope legs would have been the only test that would have been, would have had to have been done separately.

Q. What permission did you understand him to be asking for?

EXPRESS MAIL — POST OFFICE TO ADDRESSEE

130-12

B46641395

FROM:
United Terex Inc.
2579 Industry Lane
Fairview Village, PA 19403

Value Declared, If any:	Customer Number, If any:
0	

TO: U.S Army AVRADCom
4300 Goodfellow Blvd.
St. Louis, MO 63120
Attn. Wm. D. Hunt
DRDAV-PDE

ORIGIN:	
Initials of Receiving Clerk.	PL
P.O. ZIP	19406
Date In	2/11/81
Time In	1500
Weight	2 Lbs.
Postage	8/0

SERVICE GUARANTEE:
Domestic shipments under this service made at designated USPS facilities on or before a specified delivery time will be accepted for express shipment to a designated USPS delivery area having Express Mail service for next day delivery to an addressee or agent on or before the time specified by the USPS at mailing. USPS will refund postage to shipper on proof of late delivery. The postage for any shipments mailed under this service and not meeting the service standard except for those delayed by strike or work stoppage. See USPS Notice 43 for details.

INSURANCE COVERAGE:
(1) Document Reconstruction Insurance (Domestic and International Mail). Insured documents are insured against loss, damage or delay up to $50.00 per piece subject to a limit of $500.00 per occurrence. See USPS Notice 7 or Notice 53 for limitations of coverage.
(2) Merchandise Insurance (Domestic Mail only). Parcels are insured against loss or damage up to $500. The mailer must declare the value of the [illegible] See USPS Notice [illegible] for limitations of coverage.
Claims for loss, [illegible] must be made within 60 days. Claims [illegible] postmaster of the post office of mailing.

EXPRESS MAIL SERVICE
Customer Receipt

LABEL 119 JUNE 79 U.S.G.P.O. 1979–301–203

PRESS HARD

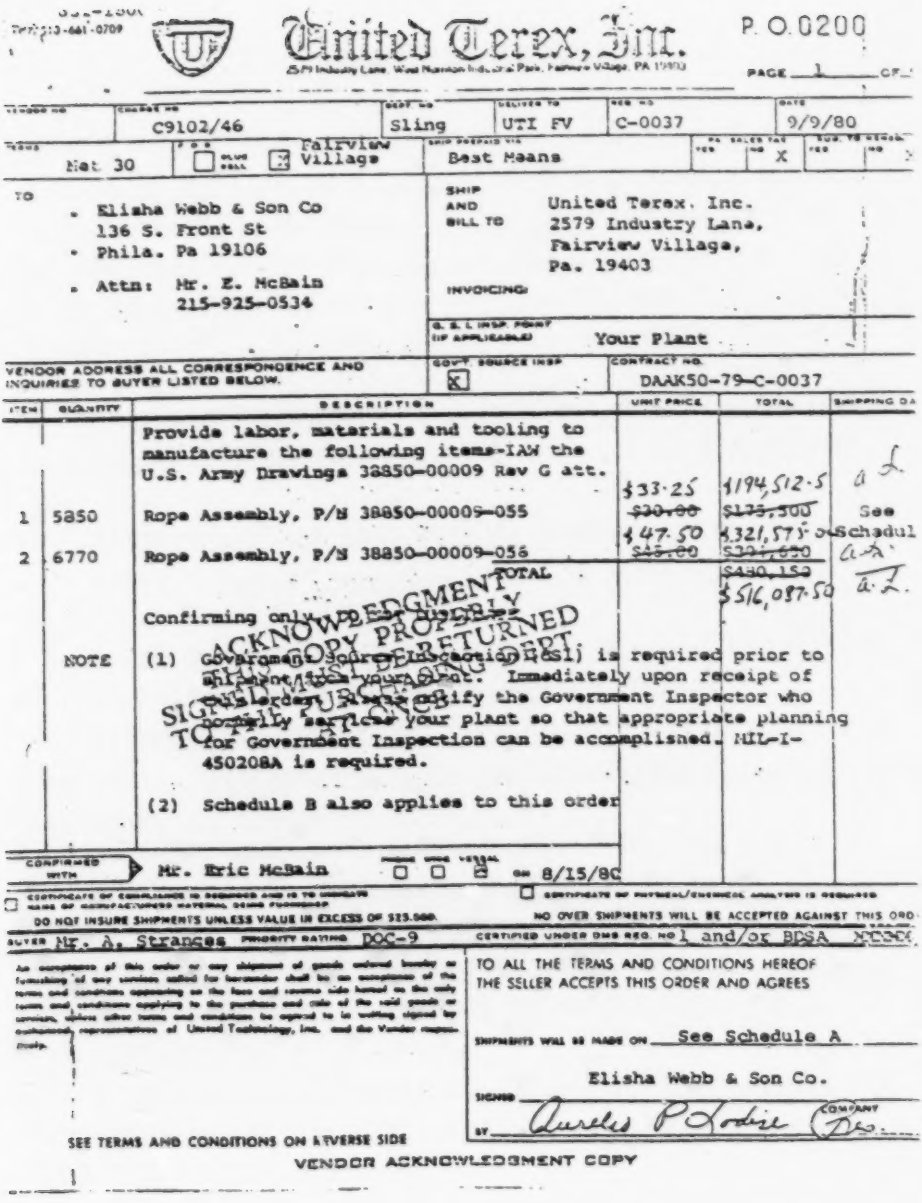
EXHIBIT N

Exhibit N

Post Office Service receipt of addressee 8:45 A.M. 2/12/81. Signed by Glenn Strong.

Submissal of First Article Test Report.

EXHIBIT O



United Terex, Inc.
2579 Industry Lane West Mormon Industrial Park, Fairview Village, PA 19403
215-643-0709

P.O. 0200

PAGE 1 OF

VENDOR NO	CHARGE NO	SHIP VIA	DELIVERED TO	REQ NO	DATE
	C9102/46	Sling	UTI FV	C-0037	9/9/80

TERMS	F.O.B.	SHIP PREPAID VIA	PA. SALES TAX	SUB. TO RENEGOT.
Net 30	☐ SHIP COLL ☒ Fairview Village	Best Means	YES NO X	YES NO

TO
- Elisha Webb & Son Co
  136 S. Front St
- Phila. Pa 19106
- Attn: Mr. E. McBain
  215-925-0534

SHIP AND BILL TO: United Terex. Inc.
2579 Industry Lane,
Fairview Village,
Pa. 19403

INVOICING:

G. E. I. INSP. POINT (IF APPLICABLE): Your Plant

VENDOR ADDRESS ALL CORRESPONDENCE AND INQUIRIES TO BUYER LISTED BELOW.

GOVT. SOURCE INSP: ☒

CONTRACT NO.: DAAK50-79-C-0037

ITEM	QUANTITY	DESCRIPTION	UNIT PRICE	TOTAL	SHIPPING DA
		Provide labor, materials and tooling to manufacture the following items-IAW the U.S. Army Drawings 38850-00009 Rev G att.			a 2.
1	5850	Rope Assembly, P/N 38850-00009-055	$33.25 ~~$30.00~~	$194,512.5 ~~$175,500~~	See
2	6770	Rope Assembly, P/N 38850-00009-056	$47.50 ~~$45.00~~	$321,575.0 ~~$304,650~~	Schedul a 2.
			TOTAL	~~$480,150~~ $516,087.50	a 2.

Confirming only [illegible]

NOTE (1) Government Source Inspection (GSI) is required prior to shipment from your plant. Immediately upon receipt of this order, please notify the Government Inspector who normally services your plant so that appropriate planning for Government Inspection can be accomplished. MIL-I-45208A is required.

(2) Schedule B also applies to this order

ACKNOWLEDGMENT COPY PROPERLY SIGNED MUST BE RETURNED TO PURCHASING DEPT.

CONFIRMED WITH: Mr. Eric McBain — ON 8/15/80

☐ CERTIFICATE OF COMPLIANCE IS REQUIRED AND IS TO ACCOMPANY NAME OF MANUFACTURER OF MATERIAL BEING FURNISHED

☐ CERTIFICATE OF PHYSICAL/CHEMICAL ANALYSIS IS REQUIRED

DO NOT INSURE SHIPMENTS UNLESS VALUE IN EXCESS OF $25,000.

NO OVER SHIPMENTS WILL BE ACCEPTED AGAINST THIS ORD

BUYER Mr. A. Stranges — PRIORITY RATING DOC-9 — CERTIFIED UNDER DMS REG. NO 1 and/or BDSA XXXXX

An acceptance of this order or any shipment of goods ordered hereby or furnishing of any services called for hereunder shall be an acceptance of the terms and conditions appearing on the face and reverse side hereof to the only terms and conditions applying to the purchase and sale of the said goods or services, unless other terms and conditions be agreed to in writing signed by authorized representatives of United Technology, Inc. and the Vendor respectively.

TO ALL THE TERMS AND CONDITIONS HEREOF THE SELLER ACCEPTS THIS ORDER AND AGREES

SHIPMENTS WILL BE MADE ON See Schedule A

SIGNED Elisha Webb & Son Co.

BY Aurelio P Lodise (COMPANY Dir.)

SEE TERMS AND CONDITIONS ON REVERSE SIDE

VENDOR ACKNOWLEDGMENT COPY

Exhibit O

SCHEDULE A

DELIVERY REQUIREMENTS

10	Each	Items 1 & 2	on or before	Sep 15, 1980 (See Note A)
1000	Each	Items 1 & 2	" " "	Nov 30, 1980
1000	Each	Items 1 & 2	" " "	Dec 31, 1980
1000	Each	Items 1 & 2	" " "	Jan 31, 1981
1000	Each	Items 1 & 2	" " "	Feb 28, 1981
1000	Each	Items 1 & 2	" " "	Mar 31, 1981
840	Each	Item 1	" " "	Apr 30, 1981
1000	Each	Item 2	" " "	Apr 30, 1981
760	Each	Item 2	" " "	May 31, 1981

Accelerated Delivery Of Any Item At No Additional Cost to UTI Is Acceptable.

NOTE (A) Elisha Webb shall provide 10 each of items 1 & 2 for UTI final inspection and acceptance to satisfy the First Article Test & Inspection requirements of the Government.

(B) Elisha Webb shall pull to destruction one of each lot of 50 or less production items and record the load. Ultimate loads must exceed 19000 # and 37, 800 # for-055-056 respectively. This requirement is in addition to the quantity ordered.

Exhibit O

SCHEDULE B

GENERAL PROVISIONS

1. Priority Rating DOC-9, Certified for National Defense use under BDSA Reg. 2 and/Or DMS Reg. 1 Rating
You are required to follow provisions of DMS Reg. 1 and of all other applicable regulations and orders of BSDA in obtaining controlled materials and other products and materials to fill this order.

2. This purchase order is subject to provisions of Defense Acquisition Regulations (DARs)

7-104.14 (a) Utilization of Small Business Concerns
7-104.20 (a)(b) Utilization of Concerns in Labor Surplus Areas
7-104.36 (a) Utilization of Minority Business Enterproses

3. All terms and conditions imposed by the Government on the prime contract, DAAK50-79-C-0037 attached herein by reference, are directly applicable to this subcontract.

4. The sub-contractor, Elisha Webb & Son, Co. subscribes to and participates in the small business and labor surplus area sub-contracting programs in accordance with the Dept. of Defense policy and regulations.

5. Inspection by United Terex, Inc. (UTI) or its assignee will be performed prior to shipment from your plant. Compliance with MIL-I-45208 is required.

6. All inspection records must be supplied to United Terex, Inc. (UTI) prior to final inspection and acceptance of the completed items.

Exhibit O

7. In consideration of this order, it is understood and agreed that the sub-contractor, Elisha Webb & Son, Co. will deal solely and directly with the Buyer (UTI) as the prime contractor, in the current, and any future procurements related to the purchased items.

8. This is a Fixed Price (not to exceed) purchase order, which contains certain inherent pricing contingencies to cover costs of rejects, repairs, rework, etc. of the items specified herein.

9. The Buyer (UTI) reserves the right to extend this order for additional quantities of the items specified herein, at unit prices not to exceed those listed in this purchase order.

10. The Sub-Contractor, Elisha Webb Son, Co., will provide on its premises, at no additional cost, a storage/assembly/inspection area to allow UTI or its assignee to perform final inspection and shipping.

11. All tooling, jigs and fixtures specifically developed for, or under this contract will become the property of UTI and shall be used for the sole purpose of the Buyer.

12. In view of the fact that a delay in the contractual delivery schedule by the sub-contractor, Elisha Webb Son, Co. will cause damages to the Buyer UTI in an amount that can not be presently accertained the Sub-contractor agrees to pay UTI liquidated damages in the amount of one-quarter of one percent (¼) of the contract unit price for each working day of the delay of each unit, but not to exceed the total cumulative amount of 10% of the contract price.

Exhibit O

ELISHA WEBB & SON COMPANY

136 S. FRONT STREET • PHILADELPHIA, PA 19106

SOLD TO: UNITED TERREX INC
2579 INDUSTRY LANE
FAIRVIEW VILLAGE, PA 19403

OCT 10 1980

MANUFACTURERS AND DISTRIBUTORS OF YACHTING AND INDUSTRIAL SUPPLIES

SHIP TO: OUR WAREHOUSE

OFFICE (215) 925-0334
FACTORY 539-8465

PROFORMA INVOICE

	0200				10-8-80	1109
	226	1½" dia. double braided nylon rope 600 ft. reels MIL-SPEC 24050B		reel		172,2
	58	1½" dia cover for thimble double braided nylon rope MIL-SPEC 24050B 600' reels		reel		21,5
	173	7/8" dia double braided nylon rope 600' reel MIL-SPEC 24050B		reel		73,5
	29	7/8" dia cover for thimble double braided nylon rope 600' reels MIL-SPEC 24050B		reel		6,1
					TOTAL ROPE	273,5
	1000	Poly urathane in 5 gal units		gal		33,5
	385	Liquid Nylon in 55 gal units		gal		3,0
	550	Methyl alcohol in 55 gal units		gal		2,2
						312,26
		COST OF MAJOR MATERIALS FOR CONTRACT #DAAK50-79-C0037				

ORIGINAL INVOICE

PLEASE
THIS A

EXHIBIT P

1. TO: (Name and ZIP Code) ACO: DCASMA, Philadelphia P.O. Box 7699 Philadelphia, Pa. 19101 PAYING OFFICE: DCASR, Philadelphia ATTN: DCRP-FACP P.O. Box 7730 Philadelphia, Pa. 19101	2. FROM: (Contractor's Name, Address, ZIP Code) United Terex, Inc. 2579 Industry Lane West Norriton Industrial Park Fairview Village, Pa. 19403

3. SMALL BUSINESS PER ASPR 1-1701 ☐ YES ☐ NO

4. CONTRACT NO. SDA K 5 0 7 9 C 0 0 3 7

5. CONTRACT PRICE $1,408,250

6. DATES		7. DATE OF INITIAL AWARD	8.
a. PROG. PAYTS	8 5	FY 79 NO 9	a. PROGRESS PAYMENT REQUEST NO. 5
b. LIQUIDATION	8 5		b. DATE OF THIS REQUEST 16 OCT 80

SECTION II - STATEMENT OF COSTS UNDER THIS CONTRACT THROUGH 16 OCT 80 (Date)

9. PAID COSTS ELIGIBLE UNDER PROGRESS PAYMENT CLAUSE		$
10. INCURRED COSTS ELIGIBLE UNDER PROGRESS PAYMENT CLAUSE		413,814
11. TOTAL COSTS ELIGIBLE FOR PROGRESS PAYMENTS (Item 9 plus 10)		413,814
12. a. TOTAL COSTS INCURRED TO DATE	$ 413,814	
b. ESTIMATED ADDITIONAL COST TO COMPLETE	925,512	
13. ITEM 11 MULTIPLIED BY ITEM 6a		351,742
14. a. PROGRESS PAYMENTS PAID TO SUBCONTRACTORS		$
b. LIQUIDATED PROGRESS PAYMENTS TO SUBCONTRACTORS		
c. UNLIQUIDATED PROGRESS PAYMENTS TO SUBCONTRACTORS (Item 14a less 14b)		
d. SUBCONTRACT PROGRESS BILLINGS APPROVED FOR CURRENT PAYMENT		
e. ELIGIBLE SUBCONTRACTOR PROGRESS PAYMENTS (Item 14a plus 14d)		
15. TOTAL DOLLAR AMOUNT (Item 13 plus 14e)		351,742
16. ITEM 5 MULTIPLIED BY ITEM 6b	1,265,013	
17. LESSER OF ITEM 15 OR ITEM 16		351,742
18. TOTAL AMOUNT OF PREVIOUS PROGRESS PAYMENTS REQUESTED		35,436
19. MAXIMUM BALANCE ELIGIBLE FOR PROGRESS PAYMENTS (Item 17 less 18)		316,306

SECTION III - COMPUTATION OF LIMITS FOR OUTSTANDING PROGRESS PAYMENTS

20. COMPUTATION OF PROGRESS PAYMENT CLAUSE a(3)(i) LIMITATION	$	
a. COSTS INCLUDED IN ITEM 11, APPLICABLE TO ITEMS DELIVERED, INVOICED, AND ACCEPTED TO THE DATE IN HEADING OF SECTION II.		
b. COSTS ELIGIBLE FOR PROGRESS PAYMENTS, APPLICABLE TO UNDELIVERED ITEMS AND TO DELIVERED ITEMS NOT INVOICED AND ACCEPTED (Item 11 less 20a)		
c. ITEM 20b MULTIPLIED BY ITEM 6a		$
d. UNLIQUIDATED PROGRESS PAYMENT TO SUBCONTRACTORS (Item 14c)		
e. LIMITATION a(3)(i) (Item 20a plus 20d)		
21. COMPUTATION OF PROGRESS PAYMENT CLAUSE a(3)(ii) LIMITATION		
a. CONTRACT PRICE OF ITEMS DELIVERED, ACCEPTED AND INVOICED TO DATE IN HEADING OF SECTION II.		
b. CONTRACT PRICE OF ITEMS NOT DELIVERED, ACCEPTED AND INVOICED (Item 5 less 21a)		
c. ITEM 21b MULTIPLIED BY ITEM 6b		
d. UNLIQUIDATED ADVANCE PAYMENTS PLUS ACCRUED INTEREST		
e. LIMITATION a(3)(ii) (Item 21a less 21d)		
22. MAXIMUM UNLIQUIDATED PROGRESS PAYMENTS (Lesser of Item 20e or 21e)		
23. TOTAL AMOUNT APPLIED AND TO BE APPLIED TO REDUCE PROGRESS PAYMENT		
24. UNLIQUIDATED PROGRESS PAYMENTS (Item 15 less 23)		
25. MAXIMUM PERMISSIBLE PROGRESS PAYMENTS (Item 22 less 24)		
26. AMOUNT OF CURRENT INVOICE FOR PROGRESS PAYMENT (Lesser of Item 25 or 19)		
27. AMOUNT APPROVED BY ACO		

CERTIFICATION

I certify that the above statement (with attachments) has been prepared from the books and records of the above-named contractor in accordance with the contract and the instructions hereon, and to the best of my knowledge and belief, that it is correct, that all the costs of contract performance (except as herewith reported in writing) have been paid to the extent shown herein, or where not shown as paid have been paid or will be paid currently, by the contractor, when due, in the ordinary course of business; that the work reflected above has been performed, that the quantities and amounts involved are consistent with the requirements of the contract. That there are no encumbrances (except as reported in writing herewith, or on previous progress payment request No. N/A) against the property acquired or produced for and allocated or properly chargeable to the contract which would affect or impair the Government's title, that there has been no materially adverse change in the financial condition of the contractor since the submission of the most recent written information dated 30 JUN 80, by the contractor to the Government in connection with the contract, that to the extent of any contract provision limiting progress payments pending final outside approval, such provision has been complied with, and that after the making of the requested progress payment the unliquidated progress payments will not exceed the maximum unliquidated progress payments permitted by the contract.

NAME AND TITLE OF CONTRACTOR REPRESENTATIVE SIGNING THIS FORM	SIGNATURE
Anthony F. Stranges Director of Finance	
NAME AND TITLE OF ADMIN CONT OFFICER	SIGNATURE

DD FORM 1 APR 79 1195 PREVIOUS EDITIONS ARE OBSOLETE. ALSO REPLACES DD FORM 1674 WHICH IS OBSOLETE.

EXHIBIT Q

COMMONWEALTH OF PENNSYLVANIA :
:
COUNTY OF PHILADELPHIA :

AURELIO P. LODISE, being duly sworn according to law, deposes and says:

1. That he is the President of Elisha Webb & Son Company ("Webb");

2. That Webb was a subcontractor to United Terex, Inc. ("UTI"), for the manufacture of sling legs for use on UTI's Government contract No. DAAK50-79-C-0037;

3. That this subcontract was consummated by my acceptance of UTI's Purchase Order No. 0200;

4. That on October 8, 1980, Webb issued a "PROFORMA" invoice to UTI in the amount of $312,262.00, representing the full contract price for the materials to be used in the manufacture of the sling legs;

5. That shortly thereafter UTI tendered the entire $312,262.00 to us but that I decided against receiving the full amount at that time because we had not yet received all the materials necessary;

6. That in fact, we were selling our building in order to acquire a larger building which could more easily accommodate all the material needed;

7. That on December 15, 1980, a Mr. William D. Hunt called me on the phone;

8. That Mr. Hunt represented himself to be the Contracting Officer on UTI's above-mentioned Government contract;

Exhibit Q

9. That he told me he had a few questions for me but that it was merely routine;

10. That Mr. Hunt questioned me as to meaning of the "PROFORMA" invoice;

11. That I told Mr. Hunt we issued that invoice to UTI to fix the prices for the subcontract and to insure that the funds to pay for all the raw materials were readily available to us on a demand basis;

12. That I explained to Mr. Hunt that Mr. Kisielowski, President of UTI, asked me to notify him immediately when a shipment of materials was received and he would immediately disburse funds to us in order to insure smooth production;

13. That Mr. Hunt asked me if I had been paid;

14. That I explained to Mr. Hunt that UTI had offered us full payment on the invoice but that I had refused it and further explained to him my reasons for that refusal;

15. That several days later, I received a letter from Mr. Hunt seeking some sort of confirmation of our conversation;

16. That a copy of Mr. Hunt's letter is attached hereto as Exhibit "A";

17. That I read over the letter quickly and put it aside;

18. That Mr. Hunt called me again several days later urging me to sign the letter and return it to him;

19. That I still did not sign the letter;

Exhibit Q

20. That Mr. Hunt called again on January 2, 1981, strongly insisting that I sign the letter;

21. That to avoid any further pressure from Mr. Hunt, I instructed my secretary to sign the letter and return it to Mr. Hunt;

22. That at the time, my secretary signed the letter, UTI had in fact paid us $14,644.59 on November 2, 1980 and $14,224.33 on December 29, 1981;

23. That on or about March 18, 1981, Mr. Kisielowski informed us that a termination for default was in process;

24. That I called Mr. Hunt and questioned him as to whether our signing and returning the letter had anything to do with the termination and whether there was anything we could do to rectify the situation;

25. That he told me that we did not cause the termination, that "he did it to himself";

26. That I then asked him "where do we stand?", and he replied, "get yourself a good lawyer";

27. That I then asked him about the approximately 2,000 slings that were being processed at that time, and he told me that there would be other contracts coming out in the future.

s/ Aurelio P. Lodise
AURELIO P. LODISE

Exhibit Q

Sworn to and subscribed
before me this 26th
day of February 1982.

s/ Sally Anne Smith
Notary Public

SALLY ANNE SMITH
Notary Public, Phila., Phila. Co.
My Commission Expires June 29, 1985

EXHIBIT R

hole diameter and pin head recess depth were discussed. Mr. Kisielowski presented UTI test report No. 0046-1, which was a UTI sponsored test to substantiate the alleged technical inadequacy of the cyclic rope test specified in the contract (Exhibit 35). His technical consultant contended that it is technically unfeasible and physically impossible to apply the load ranges at the frequency specified. Mr. Kisielowski verbally asked permission at this meeting to separate the first article test into independent tests for hardware and rope. The Contracting Officer's 12 Dec 80 letter granted this request, and also approved a deviation UTI had requested which would allow use of a different alloy on the sling grab hook (Exhibit 36).

At about this time the ACO forwarded the invoices which were the basis for UTI's receipt of the $316,306 progress payment. Upon examination of these invoices (Exhibit 37), one in particular stood out. It was from Elisha Webb and Son Co. (Exhibit 37-1) and is marked "Proforma Invoice". It indicates the goods were sold to UTI but shipped to "our warehouse." No terms are shown. In contrast, another invoice from Elish Webb and Son Co. (Exhibit 37-2) does not call itself "proforma", the "sold to" and "ship to" are both to UTI, and it does contain terms. The Contracting Officer contacted Mr. Lodise, Elisha Webb's president, on 15 Dec 80 and asked him to explain the invoice. Mr. Lodise advised that the purpose of this "proforma" invoice was to set terms, didn't formally order anything and that he had received no money from UTI. He confirmed this conversation in writing by letter of 2 Jan 81 (Exhibit 38). The Contracting Officer asked DCAS, Philadelphia to audit UTI's books to determine if the costs of the $316,306 progress payment had been incurred (Exhibit 39). The Contracting Officer's legal advisor, suspecting fraud, wrote to the U.S. Attorney in Philadelphia asking them to investigate (Exhibit 40).

Exhibit R

After the 4 Dec meeting in St. Louis and the UTI allegations that the cyclic rope test was impossible to perform, the Government decided to contract with an independent entity to perform the test in order to verify that it could be done. Sample ropes were purchased from Wellington Puritan Mills under contract DAAK50-81-M-0272 (Exhibit 41). Contract DAAK50-81-M-0271 was awarded to Wyle Laboratories on 22 Dec 80 (Exhibit 42). Wyle performed the test on 6 Jan 81. Its report, dated 19 Feb 81 (Exhibit 43) indicated that the rope does respond adequately to the input loads such that there is no change in signal wave form or amplitude between the driving end and opposite end when cycling at loads and frequencies up to and beyond the specification requirements. (See paragraph 5.2.4 of Exhibit 43). However, it was found that the rope temperature rise was greater than expected, with potential adverse effects on the nylon and polyurethane. Rather than risk deformation of the polyurethane,

EXHIBIT S

PRESCO INTERNATIONAL, INC.
Giving Defense a Lift

April 23, 1982

U.S. Army Aviation Research
and Development
4300 Goodfellow Blvd.
St. Louis, MO 63120
ATTN: Bill Hunt
DRDAV-PDE

Subject: Contract #DAAK50-80-C-0033

Gentlemen,

In reference to our conversation on April 20, 1982, under the circumstance, we will be unable to meet the delivery schedule and have, at this time, no way of knowing what a good schedule would be.

We will be requesting a schedule revision as soon as we have a better idea of when we can get on a steady shipping basis.

If you have any questions, please feel free to contact me.

Sincerely,

s/ Stephen G. Sandnes,
Corporate Secretary

SGS/ljm

Exhibit S

P.O. Box 330 110 Third Street New Cumberland, PA 17070 (717) 774-7036

Rope, Wire Rope and Cable Assemblies

EXHIBIT T

DEPARTMENT OF THE ARMY

HQ, US Army Aviation Research and Development Command
4300 Goodfellow Boulevard, St. Louis, MO 63120

DRDAV-PDE 2 Apr 1981

Mr. E. Kisielowski, President
United Terex Incorporated
2579 Industry Lane
Norriton Industrial Park
Fairview Village, PA 19403

Dear Mr. Kisielowski:

I have reviewed the decision of my Contracting Officer, Mr. William D. Hunt, concerning the Termination for Default Notice he provided you regarding Contract DAAK50-79-C-0037.

You alleged there were errors in the technical data package. However, I do not believe they were material enough to have prevented your product from being available for First Article Test in accordance with the amended schedule in our contract with you. The specifications were yours to satisfy whether you agreed with their validity or not. The tests were possible to perform as identical tests have been performed by the Government. In addition, a contract for the same item was awarded to another contractor during September 1980, a year after you were awarded your contract, and he has successfully completed the identical First Article Tests that are specified in your contract. Therefore, I cannot agree that specification inadequacy precluded timely performance.

Exhibit T

Regarding the $249,461 progress payment to you for which you had not yet incurred costs, you stated the matter had been resolved with DCASMA, Philadelphia, PA. Subsequent conversations with their Legal and Contracts Offices indicate no such meeting of the minds has occurred. Therefore, I cannot agree that the progress payment issue has been removed as a basis of the Termination for Default action.

I find that my Contracting Officer, Mr. William D. Hunt, took action in a logical manner consistent with the facts. I therefore uphold his decision.

Sincerely,

s/ Story C. Stevens
STORY C. STEVENS
Major General USA
Commanding

EXHIBIT U

C. R. Mergel/db/314-263-2250

DRSTS-PCFF

Small Business Administration
Region 111
(illegible)
Suite 646
Bala Cynwyd, PA 19004

Dear Sir:

Pursuant to the Defense Acquisition Regulation 1-705.4 you are hereby informed that United Terex, Inc., Fairview Village, PA has submitted a partial responsive bid under Solicitation No. DAAJ09-81-B-1020 (PFF) issued by the US Army Troop Support & Aviation Materiel Readiness (illegible) for Aerial Cargo Slings, NSN: 1670-01-027-2900 and 2902 totalling $703,715.00.

The above referenced bidder has represented in his bid to be a small business firm and has been determined by the Contracting Officer to be nonresponsible and considered inadequate for the purposes of performing under the proposed contract.

The determination on nonresponsibility is based on contractor's past performance on a terminated contract indicating lack of integrity.

In accordance with Defense Acquisition Regulation 3-705.4(d), enclosed are:

a. Three copies of the solicitation (Incl 1).

b. Copy of preaward survey #S3915A19047SC (Incl 2).

Exhibit U

c. Copy of the Abstract of Bids (Incl 3).

d. Copy investigative report — United Terex Inc. vs U.S. Court of Claims No. 353-81C (Incl 4).

e. The PCO's determination of nonresponsibility (Incl 5).

Pursuant to existing policy concerning the coordination, cooperation, and exchange of information in Certificate of Competency (COC) actions between your agency and the Department of Defense Purchasing Office the undersigned offers his services and those of an engineering member of his staff to assist and accompany you in connection with your preaward survey and/or technical review of the offeror's capability.

If your office proposes to issue a COC or make an affirmative recommendation for the issuance of a COC, this office would appreciate an opportunity to discuss this matter with you prior to your issuance of a COC or referral to your higher headquarters. Please furnish this office a summary of your findings and conclusions in order that we may (illegible) at the lowest possible echelon.

If this office can be of further assistance to you, please call the undersigned at 314-263-2290.

Sincerely,

GEORGE R. MERGEL
Contracting Officer

5 Incl
As stated

Exhibit U

DETERMINATION OF NONRESPONSIBILITY

PROCUREMENT: Invitation for Bid No. DAAJ09-81-B-1020 (PFF)

NSN: 1670-01-027-2900 and
1670-01-027-2902

BIDDER: United Terex Inc. (UTI)
2579 Industry Lane
Fairview Village, PA 19403

1. Pre-Award Survey No. S3915A19047SC was completed 23 Oct 81 by DCASMA Philadelphia, PA and satisfactory rating was given for Factors 1, 2, 3, 4, 5, 8, 12 and 13. Award was recommended. However, it is the determination of the Contracting Officer that the contractor is nonresponsible based on the following unsatisfactory factors:

a. The Pre-Award Survey mentions Termination of Contract DAAK50-79-C-0037 but did not indicate any detail relative to the facts leading to the Termination. This was reviewed inasmuch as this solicitation covers the "re-buy" and UTI's action had to be considered in light of this new proposed contract.

b. Their actions in the terminated contract would possibly indicate similar problems could arise if they were awarded the reprocurement.

2. Invitation for Bid No. DAAJ09-81-B-1020 (PFF) was issued on 13 Aug 81. It called for the following items:

1675	ea	Aerial Cargo Slings 25,000 lbs.
1445	ea	Aerial Cargo Slings 10,000 lbs.
1125	ea	Aerial Cargo Slings 25,000 lbs.
1125	ea	Aerial Cargo Slings 10,000 lbs.

Exhibit U

The first two quantities, 1675 and 1445 each represent the reprocurement quantity from Contract DAAK50-79-C-0037 with United Terex Inc. of Fairview Village, PA, which was terminated for default.

3. The funds for the two quantities of 1125 each have been withdrawn, so that award will be made only on the reprocurement quantities.

4. One of the bases for the Termination for Default on the earlier contract was United Terex's request for, and receipt of, a progress payment for which it incurred no costs. This is a violation of the Progress Payments clause in its contract, and a breach of the contract. United Terex submitted an invoice marked "pro forma" for $312,262.00 as evidence of a purchase of rope. The President of the rope manufacturing company was contacted and he advised that the purpose of the invoice was to set terms for any future sale that nothing had been ordered, and no money changed hands. A subsequent DCAA audit confirmed that United Terex's books reflected an overpayment by the Army of $249,461.00.

5. In addition to this amount, United Terex has received approximately $223,000.00 in customary progress payments under the defaulted contract. A total of approximately $472,000.00 of the government's money is therefore being held by United Terex and to date no items have ever been delivered. Requests for an accounting of the inventory purchased with the $223,000.00 have been ignored. Demands for repayment have also been ignored. UTI is appealing the termination in the Court of Claims.

6. Pursuant to DAR 1-608, a request to suspend United Terex from further participation in future contracts has been forwarded to the Department of the Army. Disposition of this request is pending.

Exhibit U

7. In review of the above, it is my belief that United Terex's actions indicate a lack of honesty and moral principle and substantial evidence exists which casts serious doubts as to the integrity of subject contractor. I hereby determine United Terex Inc. nonresponsible within the meaning of DAR 1-903.1(iv).

s/ George R. Mergel
GEORGE R. MERGEL
Contracting Officer

COORDINATION_____

Date_____

AFFIDAVIT OF LORETTA HARRIS

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

CIVIL ACTION NO. 82-3795

EUGENE KISIELOWSKI and UNITED TEREX, INC.,

Plaintiffs

v.

UNITED STATES OF AMERICA, WILLIAM HUNT and GEORGE MERGEL,

Defendants

I, LORETTA HARRIS, having been first duly sworn, hereby depose and say:

1. I am the branch secretary (stenography) of the Engine and Aircraft Components Branch, Procurement Division, of the Directorate for Procurement and Production, US Army Aviation Research and Development Command, 4300 Goodfellow Blvd., St. Louis, Missouri 63120. My supervisor is the branch chief. William Hunt, one of the defendants, is also an employee of this branch. My duties include responsibility for the administrative details necessary to ensure that the branch functions smoothly.

2. On the morning of September 22, 1982 a man unknown to me stopped in our branch. He asked for William Hunt. When I informed him that Mr. Hunt was not at his desk, he handed me some papers and asked that I give them to Mr. Hunt when he returned. The papers were entitled "Summons", and were civil

action 82-3795, Eastern District of Pennsylvania, *Eugene Kisielowski and United Terex, Inc. v. United States of America, William Hunt and George Mergel.* The man never identified himself to me, nor did he ask me to sign any receipt.

s/ Loretta Harris
LORETTA HARRIS

STATE OF MISSOURI)
)
CITY OF ST. LOUIS)

Subscribed and sworn to before me this 26th day of May, 1983.

s/ C.R.R.
NOTARY PUBLIC
C.R. Robinson III
State of Missouri, St. Louis City
My commission expires:
Oct. 16, 1983

Office - Supreme Court, U.S.
FILED
AUG 14 1984
ALEXANDER L. STEVAS,
CLERK

No. 83-2059

In the Supreme Court of the United Sta

OCTOBER TERM, 1984

EUGENE KISIELOWSKI AND UNITED TEREX, INC.,
PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

REX E. LEE
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

8 pp

BEST AVAILABLE COPY

TABLE OF AUTHORITIES

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Fed. R. Civ. P. 4(d) 2

In the Supreme Court of the United States

OCTOBER TERM, 1984

No. 83-2059

EUGENE KISIELOWSKI AND UNITED TEREX, INC., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioners seek review of the holding of the court of appeals that their suit was not properly brought under the Federal Tort Claims Act (FTCA), 28 U.S.C. 1346(b) and 2671 *et seq.*, because their claims sound in contract rather than in tort.

1. In 1979, petitioner United Terex, Inc. (UTI), a Pennsylvania corporation, was awarded a contract to produce 3120 aerial cargo slings for the United States Army Aviation Research and Development Command in St. Louis, Missouri (Pet. App. 43a). Between July 1980 and March 1981, UTI and its chief executive officer, petitioner Kisielowski, had a series of disputes with William Hunt, the contracting officer, concerning UTI's performance (*id.* at 6a, 44a-47a).

After Hunt terminated UTI's 1979 contract, the United States Troop Support and Aviation Materiel Readiness Command invited bids to reprocure the 3120 aerial cargo slings (Pet. App. 49a). UTI submitted the lowest bid. The contracting officer for the reprocurement contract, George Mergel, learned about UTI's earlier problem with this contract and, pursuant to 15 U.S.C. 637(b)(1)(F)(7)(A), he submitted the matter to the Small Business Administration (SBA) for a determination of whether it would issue UTI a Certificate of Competency. The SBA declined to issue the Certificate and UTI's bid was rejected (Pet. App. 6a-7a, 51a).

2. Petitioners filed the instant action in the United States District Court for the Eastern District of Pennsylvania against the two contracting officers and the United States.[1] The claims against the United States, which were based solely on the Federal Tort Claims Act, 28 U.S.C. 1346 and 2671 *et seq.*, alleged as follows: the United States had conspired to punish and had punished petitioners summarily by terminating UTI's first procurement contract for aerial cargo slings and by refusing to accept UTI's bid on the later contract (Counts I and II); the United States had interfered with petitioners' "prospective advantage" by injuring petitioners' reputation as a government contractor (Count III); the United States had violated petitioners' due process rights by terminating the contract summarily (Count IV);

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[1]The counts of the complaint against the contracting officers alleged that they had conspired to deprive petitioners of constitutional and contractual rights. The district court dismissed the claims against Mergel on the grounds that he had not been personally served with process under Fed. R. Civ. P. 4(d) (Pet. App. 7a-11a) and that the court lacked personal jurisdiction over him. The court also dismissed the suit against Hunt for want of personal jurisdiction (*id.* at 11a-16a). The court of appeals affirmed those dismissals (*id.* at 2a-3a), and petitioners have presented no question concerning the individual defendants in their petition.

and the United States had intentionally inflicted mental distress on petitioner Kisielowski by its handling of the contracts (Count V) (Pet. App. 28a-32a).

The district court dismissed all of petitioners' claims against the United States (Pet. App. 6a-24a). The court held that Count III of the complaint alleging "interference with prospective advantage" was a claim arising out of "interference with contract rights" within the meaning of 28 U.S.C. 2680(h), and therefore recovery under the Tort Claims Act was barred (Pet. App. 16a-17a).[2] With respect to Count V—intentional infliction of emotional distress—the court held that the facts alleged did not constitute sufficiently outrageous behavior to warrant recovery under Pennsylvania law (*id.* at 18a-20a). Finally, with respect to Counts I, II and IV, the court held that the claims all involved basic breach of contract allegations and were not "essentially" tort claims (*id.* at 21a-24a). Accordingly, the district court concluded that these claims should have been brought in the United States Claims Court pursuant to the Tucker Act, 28 U.S.C. 1346(a)(2) and the Contract Disputes Act of 1978, 41 U.S.C. (Supp. V) 601 *et seq.* (Pet. App. 21a).

The court of appeals affirmed in an unpublished opinion (Pet. App. 1a-5a). The court of appeals rejected petitioners' contention that Counts I, II and IV are tort actions and instead agreed with the district court that the three counts "are contract claims cast in tort language" (Pet. App. 3a). The court of appeals also upheld the dismissal of Count V on the ground that "the alleged conduct, even if proven to

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[2]The court also found that petitioners had failed to present this claim to the Secretary of the Army when they sought administrative relief under 28 U.S.C. 2675(a). Accordingly, the court held alternatively that this claim was barred for failure to exhaust administrative remedies (Pet. App. 17a-18a). Petitioners did not seek further review of the district court's dismissal of Count III.

be true, is plainly not of the 'extreme and outrageous' type as to be actionable as a matter of law" (*id.* at 4a).

3. Petitioners argue (Pet. 12-15) that the court of appeals applied a "test" different from that used in other circuits in deciding whether claims are purely contractual or allege a tort. In fact, there is no "test" available for making the fine distinctions sometimes called for by the jurisdictional confluence of the Tucker Act and the Federal Tort Claims Act. Compare *Martin* v. *United States*, 649 F.2d 701, 704-705 (9th Cir. 1981), with *id.* at 705-706 (Ferguson, J., dissenting).[3] Instead, each case must be evaluated on its own facts.[4] The decision of the district court, affirmed by the court of appeals, that petitioners' allegations in Counts I, II and IV are more properly viewed as contract claims than tort claims is reasonable and has no precedential effect beyond petitioners' case. Accordingly, further review by this Court is not warranted.

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[3]In *Martin* v. *United States*, 649 F.2d at 705, the court stressed that other FTCA cases that had been dismissed as being contractual in nature "involve breaches in commercial relationships leading to loss of profit or other purely economic harm." See, *e.g.*, *Woodbury* v. *United States*, 313 F.2d 291 (9th Cir. 1963). This statement is equally applicable to the instant case.

[4]Petitioners are correct in contending (Pet. 12) that tort claims occasionally may arise out of contract disputes. Thus, in *Aleutco Corp.* v. *United States*, 244 F.2d 674 (3d Cir. 1957), the court held that plaintiff's attempt to recover property that the Navy was holding and refused to release was a classic tort suit for conversion. Similarly, in *Martin* v. *United States*, 649 F.2d at 705, the court held that California tort law recognized liability when a vendee of property was injured by an unsafe condition left by the vendor. This duty was independent of any contractual obligation to repair the unsafe condition. Indeed, the courts below implicitly recognized this distinction when they considered petitioner Kisielowski's claim of intentional infliction of emotional distress. That claim arose out of the handling of the contracts, but was based on a separate, identifiable tort theory recognized by Pennsylvania law. Petitioners make no attempt to indicate precisely how their allegations in Counts I, II and IV state a claim for recovery recognized under Pennsylvania tort law.

As the district court held, petitioners' allegation that the United States "punished" them summarily is based solely on the termination of the first contract and the refusal to award the second one. These are unquestionably contract issues that should be presented to the Claims Court, which is better suited to judge whether petitioners performed their contract and, if not, whether the breach was justified. See *Woodbury* v. *United States*, 313 F.2d 291, 295 (9th Cir. 1963). Indeed, petitioners have such a suit pending in the Claims Court. See Pet. 7 n.2.

With respect to Count IV, petitioners do no more than recast their "summary punishment" allegation into a due process claim. But the claim remains at bottom a breach of contract issue, because if petitioners did not perform as required and that nonperformance was not excusable, then termination of the contract was fully justified. If termination was not justified, petitioners have a remedy under the Tucker Act.[5]

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

REX E. LEE
Solicitor General

AUGUST 1984

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[5]To the extent that petitioners seek to advance a constitutional tort claim against the United States, that claim is barred by sovereign immunity. This Court has held that the United States has not waived its immunity from suits seeking damages for due process violations (see, *e.g.*, *United States* v. *Mitchell*, 445 U.S. 535, 538 (1980); *United States* v. *Testan*, 424 U.S. 392, 400-402 (1976)), even when those suits are filed under the FTCA. See *Carlson* v. *Green*, 446 U.S. 14, 23 (1980); see also 28 U.S.C. 2680(h) (prohibiting, with exceptions not applicable here, intentional tort claims against the United States).